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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

No. 369

ATLANTIC & YADKIN RAILWAY COMPANY,

Appellant,

vs.

A. D. WATTS, ET AL.,

Appellees.

BRIEF FOR APPELLANT.

S. R. PRINCE,
Counsel for Plaintiff.

L. E. JEFFRIES,
W. M. HENDREN,
C. O. AMONETTE,
Of Counsel.

PRESS OF THE SUDWARTH CO., WASHINGTON

IN THE

Supreme Court of the United States

ATLANTIC & YADKIN RAILWAY COMPANY,

Appellant,

vs.

A. D. WATTS, ET AL.,

Appellees.

BRIEF FOR APPELLANT.

The Atlantic & Yadkin Railway Company, a North Carolina corporation, operating 161 miles of railroad in North Carolina, filed its Bill in the United States District Court for the Western District of North Carolina against A. D. Watts, Commissioner of Revenue of North Carolina, and 23 other tax assessing and collecting officers of the State and the counties and cities through which the Railway operates, seeking to enjoin the collection of taxes on an illegal overassessment of its property for ad valorem tax purposes and praying to be relieved of the payment of a franchise tax under a void franchise tax law.

The Three Judge Court assembled under Sec-

tion 266 of the Judicial Code, denied the application for an interlocutory injunction. Plaintiff, under an agreement with the State, paid its ad valorem taxes on a valuation of $1,975,806.00 (23), its assessment for 1919. Plaintiff secured a restraining order against the collection of further taxes pending the decision of this appeal.

This is a suit similar to that of Southern Railway Company vs. A. D. Watts, et al., No. 368, with which it has been consolidated for the argument, and counsel will not repeat the brief filed therein, but ask leave of the Court to refer thereto.

STATEMENT OF THE CASE.

For the year 1919, plaintiff's assessment was $1,975,806.00. For 1920, the Tax Commission increased the assessment to $4,104,710.00. In 1920, the Railway Company paid its taxes under protest. In 1921, the Commissioner of Revenue declined to make any change or reduction. Plaintiff's claim that the assessment of $4,104,710.00 is in excess of true value is based on:

(a) Statement of its operating results for five year period shows average deficit of $81,299.39 (8).

(b) Its total stock and bonded indebtedness is $2,500,000.00. Fair average market value would not exceed $1,750,000.00 (8).

(c) Amount of property, investment in road

and equipment, filed with Interstate Commerce Commission as of December 31, 1919, was $2,690,-349.00.

(d) Bureau of Valuation of the Interstate Commerce Commission has made a tentative report of cost of reproduction less depreciation, and if estimated value of land be added, the value thus arrived at is $2,886,570.00 (8).

(e) The Government declined to pay any standard return for the twenty-six months the Government had the road, due to a report by the Interstate Commerce Commission of an annual deficit during the test period of $57,477.72 (9).

Defendants aver in their answer that the assessment of $4,104,710.00 represents the true, actual value of said property (137); that the State Tax Commission assessed all of the lines operated by the Southern Railway, including plaintiff, together at the amount of $101,960,413.00 and then apportioned the above amount to plaintiff (138); that the apportionment was made by the Tax Commission in accordance with the plan suggested by the Tax Commissioner of the Southern Railway System (138); that plaintiff is a separate corporate entity, but that Southern Railway controls plaintiff through ownership of entire capital stock and operates plaintiff as a part of the Southern Railway System (139); that neither Southern Railway nor plaintiff is prejudiced by the assess-

ment together of the properties or the allocation of $4,104,710.00 against plaintiff; "that if the said total assessment of plaintiff's property were in any way in excess of the actual value of such property, this would result from the fact that other properties belonging to the Southern Railway System and to the same owner were underassessed and the difference added to the plaintiff's assessment by reason of the method of allocation suggested by the plaintiff itself and the Southern Railway Company." (139)

Plaintiff's proof on this point by its tax officer was:

> "That the total assessment of $101,960,413 placed by the State Tax Commission in 1920 upon property of plaintiff, Southern Railway Company and two other railroad companies was 207.8 per cent of the assessment of the same properties for 1919 and several previous years. That after the assessment of $101,960,413 finally was fixed by said Tax Commission, affiant was asked when in Raleigh by Mr. Maxwell, one of the Commissioners, and by Mr. Griffin, the Revaluation Clerk of the Commission, if he would perform the clerical work incident to the allocation of the assessment set out to plaintiff, to the several owned and leased lines of Southern Railway Company, to the Yadkin Railroad Company and to the High Point, Randleman, Asheboro and Southern Railroad Company. That in said conference with Messrs. Maxwell and Griffin the method of allocation was determined by them and that affiant's work in connection there-

with was merely clerical. That thereafter on July 21, 1920, affiant, as stated in the answer on page 5, wrote a letter to Mr. Griffin, the Revaluation Clerk of the Commission, to which was attached a statement setting out the values allocated to plaintiff and to the other railroads in accordance with the plan agreed upon by Messrs. Maxwell and Griffin as aforesaid. That the assessment of $4,104,710 placed upon the property of plaintiff was not suggested by affiant in any way except that affiant did make the figures according to the aforesaid plan. That plaintiff's assessment for 1919 was $12,-262.96 per mile which, multiplied by 207.8 per cent made the 1920 assessment of $25,482.43 per mile and this being multiplied by plaintiff's mileage in North Carolina showed a total assessment for 1920 of $4,104,710. Affiant further says that in said letter he wrote the quotation shown on page 7 of the answer without intention of suggesting or acknowledging that plaintiff's assessment was too low but only because of the fact that the tax rates in the several counties traversed by plaintiff and by the North Carolina Midland were materially lower than the tax rates in counties traversed by Southern Railway for which reason it would follow that the total amount of taxes paid by Southern Railway Company and all its affiliated lines in North Carolina would be reduced if values were imported into counties levying smaller tax rates." (54)

Defendants' proof is:

"He has read the affidavit filed by Murry R. Hubbard in the above entitled suit. It was

agreed between the affiant and Mr. Griffin and the said Murray Hubbard, Tax Commissioner of the Southern Railway System, that the said Murray Hubbard should take the total assessment of $101,960,413.00 and work out an apportionment of this total assessment among the different lines of the Southern Railway System in North Carolina, and Mr. Hubbard took the said assessment with him to Atlanta and worked out his own suggestion as to how it should be apportioned which suggestion he then transmitted to the State Tax Commission in the letter, a copy whereof is hereto attached and marked Exhibit A. As alleged in the answer of the defendants in the above entitled suit, the assessment of the properties of the Atlantic and Yadkin Railway Company made by the Tax Commission for the year 1920 was simply an adoption of this apportionment worked out and suggested by Mr. Hubbard. It was a suggested apportionment prepared and submitted by him as Tax Commissioner and representative of the Southern Railway System. It was not determined by the affiant nor by Mr. Griffin, but was adopted by the Tax Commission." (96)

The part the Tax Commissioner of Southern Railway System played in distributing the assessment is shown on pages 98 and 99 of the record.

Ad Valorem Assessment:

The assessment was not made in accordance with the statute in this:

(a) The tangible and intangible property of plaintiff was not assessed separately.

(b) Section 64 of the Machinery Act provides that the value of the tangible property shall be determined by use of actual cost of replacing the property. This was not done. If it had been, the proof is that the amount hereof would have been $2,886,570.00.

(c) Section 64 of the Machinery Act provides that the value of the franchise shall be determined by due consideration of the gross earnings as compared with the operating expenses. This was not done. If it had been done, the proof being that there was an annual deficit of $81,000.00, no value would have been arrived at on this basis. There is no justification in the law for arriving at the total value of Southern Railway Company and this company by capitalizing a net return which the Southern Railway Company had.

(d) Section 64 of the Machinery Act also provides that in arriving at the value of the franchise particular consideration should be given to the value placed upon the whole property by the pub-

lic, as evidenced by the market value of all capital stock, cerificates of indebtedness, etc. This was not done. If it had been done, the proof shows that the value under this plan would have been $1,750,000.00. This feature of the law was not followed in the consolidated method pursued by the Tax Commission. If it had been, the total result would have been much less.

Plaintiff had the right to have its property assessed independently of any other taxpayer. The defense in this case amounts to a plea of confession and avoidance. The assessment in and of itself is indefensible and should not stand unless the part played therein by the Tax Commissioner of the Southern Railway System estops plaintiff from taking advantage of the overassessment. After the total assessment of $101,960,413.00 was finally fixed over the protest of plaintiff, the Tax Commissioner of Southern Railway made the distribution of the total; he testifies he was asked by the Chairman of the Tax Commission to do this (54). The Tax Commission says it was agreed that he work out the apportionment (96). The Railway's tax officer advised the Commission the method pursued by him, namely, he found that the total 1920 assessment was 207.8 per cent times the total of the 1919 assessment and—

> "That plaintiff's assessment for 1919 was $12,262.96 per mile which, multiplied by 207.8 per cent made the 1920 assessment of $25,-482.43 per mile and this being multiplied by

plaintiff's mileage in North Carolina showed a total assessment for 1920 of $4,104,710."

In returning the distribution to the State Tax Commission, he said in part:

"If you feel that any of these values are too high, I would suggest that it would be entirely proper to give a further arbitrary increase to the North Carolina Midland and to the Atlantic & Yadkin in order to absorbe any reduction on the double track line. You understand, of course, that I am not wedded to this distribution and am making same only as a suggestion and for the purpose of affording you all possible assistance."

On this record we contend that certainly nothing was done to ratify the erroneous and unlawful total of $101,960,413.00. It is not a defense to this plaintiff's overassessment to say that but for such figure being allocated to plaintiff some other taxpayer would have had a larger assessment. The distribution may have been the best that could be made of the erroneous total. However arrived at, it was adopted by and became the Tax Commission's assessment, and if illegal should not stand. There was no agreement as to the amount of this assessment. There was merely a suggestion of the distribution of the erroneous total. This distribution was for the year 1920 and there is no proof that the Railway's tax officer made that distribution or any distribution for 1921, which is the as-

sessment complained of. Therefore, when plaintiff asked the Revenue Commissioner to review the assessment, that should have been done. If for any reason at that time plaintiff's property was overassessed and no change was made, we contend that the result is an unlawful assessment.

The ad valorem assessment is further void because of non-uniformity in that members of the same class are assessed differently, to the plaintiff's harm.

Plaintiff was entitled to a reduction in the assessed value of its property because under the facts its property was of less value in 1921 than in 1920, and for property generally in the State to be horizontally reduced in varying percents and plaintiff's property not to be reduced is an unlawful discrimination.

The assessment is void because the other property generally in the State has been intentionally and systematically undervalued, to-wit, at 67 per cent of true value, while plaintiff's property has been overvalued.

For the general reasons of invalidity and citations to sustain the same, leave is asked to refer to the brief of plaintiff in the case of Southern Railway Company vs. Watts, et al., No. 368 in this Court, with which this case has been consolidated for argument.

Franchise Tax:

1. The so-called franchise tax is not a franchise

tax, but is an additional property tax and void under the Uniformity Section of the North Carolina Constitution, and the enforcement of such law deprives plaintiff of the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States.

2. The so-called franchise tax is void because it is a burden upon interstate commerce contrary to the Commerce Clause of the Federal Constitution.

3. It is void because made a condition precedent to the doing of an interstate business.

The plaintiff has paid to counties and municipalities for the year 1921 on the stipulated assessment of $1,975,806.00 pending the litigation the sum of $22,086.18, whereas in 1920 it paid on an assessment of $4,104,710.00 the sum of $26,423.95. The reason for the amount paid up to now in 1921, notwithstanding the reduced assessment is the very marked increase in tax rates. If the assessment of $4,104,710.00 remains, the Atlantic & Yadkin Railway Company will pay total taxes of $50,-091.50. There is therefore involved over $20,000.00 in excess taxes.

Respectfully submitted,

S. R. PRINCE,
Counsel for Plaintiff.

L. E. JEFFRIES,
W. M. HENDREN,
C. O. AMONETTE,
Of Counsel.

Office Supreme Court, U. S.
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No. 928 369

IN THE

Supreme Court of the United States

ATLANTIC AND YADKIN RAILWAY COMPANY,
Appellant,
vs.
A. D. WATTS, ET AL.,
Appellee.

No.....
In Equity.

Motion for Temporary Restraining Order to Supreme Court under Section 266 of the Judicial Code of the United States.

PRESS OF THE BYDWARTH COMPANY, WASHINGTON

IN THE

SUPREME COURT OF THE UNITED STATES

ATLANTIC AND YADKIN RAILWAY COMPANY,
Appellant,

vs.

A. D. WATTS, ET AL.,
Appellee.

No.....
In Equity.

Motion for Temporary Restraining Order to Supreme Court under Section 266 of the Judicial Code of the United States.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now, appellant, Atlantic and Yadkin Railway Company, by its attorneys, representing to the Court that it has appealed to the Supreme Court of the United States from an order hereto-

fore entered herein on March 18, 1922, by the District Court of the United States for the Western District of North Carolina, denying appellant's application for an interlocutory injunction, which appeal has been allowed by said District Court and the record on said appeal has heretofore this day been filed and docketed in this Court, and respectfully moves the Court to grant a temporary restraining order herein pending the hearing and decision of such appeal by this Court, and for grounds of its motion shows:

1. On September 30, 1921, appellant (hereinafter called plaintiff) filed its bill in the United States District Court for the Western District of North Carolina, making as defendants thereto A. D. Watts individually and as Commissioner of Revenue of the State of North Carolina, Baxter Durham, Auditor of the State of North Carolina, Benjamin R. Lacey, Treasurer of the State of North Carolina, James S. Manning, Attorney General of the State of North Carolina, and eight Sheriffs of the several counties in North Carolina through which appellant operated and paid taxes, and twelve Tax Collectors of the cities and towns through which appellant operated and paid taxes. The necessity for having twenty-four defendants was that the Revenue Commissioner certified the assessment complained of to the several counties, cities and school districts so soon after the fixing of the assessment as that plaintiff

had not an opportunity to enjoin the certification and therefore was compelled to enjoin the tax collecting officers of the State in each tax district from collecting taxes on the assessment which had been so certified.

2. The bill filed sought to enjoin the State's taxing officers (1) from collecting property taxes upon an excessive ad valorem assessment of $4,104,710.00; (2) from collecting a franchise tax under a void Franchise Tax Law; (3) from collecting a franchise or privilege tax based upon an excessive assessment of $4,104,710.00.

Ad Valorem Assessment. The ad valorem assessment, it was averred, was illegal for the following reasons:

(a) The assessment of plaintiff's property at $4,104,710.00 is in excess of the true value in money of said property for tax purposes as the same is defined under the North Carolina law, and the collection of taxes thereon deprives plaintiff of the equal protection of the law contrary to the Constitution of the United States.

(b) The North Carolina tax officials failed and refused to follow the method prescribed by the statutes of North Carolina for the assessment of railroads, but assessed the property of plaintiff on a basis not authorized or sanctioned by the North Carolina statute, such basis being arbitrary

and illegal and the assessment arrived at therefore invalid.

(c) The method of valuation for tax purposes followed by the tax officers of North Carolina imported into the State of North Carolina values which are elsewhere and thus violated the Commerce Clause of the Constitution of the United States.

(d) The County Boards of Review of five of the eight counties through which plaintiff operates made horizontal reductions in the assessed value in said counties as a whole of real property varying from 25 to 33 1/3 per cent. The Revenue Commissioner declined to give to plaintiff similar horizontal reductions in plaintiff's right of way, lands and structures thereon, situated in said counties. This was an illegal discrimination and this declination on the part of the Revenue Commissioner violated Section 3 of Article 5 of the Constitution of North Carolina and violated the Fourteenth Amendment to the Constitution of the United States.

(e) That the Uniformity Clause of the North Carolina Constitution and the Fourteenth Amendment of the Federal Constitution have been violated, in that, while plaintiff's property is alleged by the State to be assessed at its true value for tax purposes, the property of other taxpayers generally in the State is habitually, cus-

tomarily and systematically assessed for tax purposes at less than true value.

Franchise Tax. The following are the grounds upon which we base our contention that the franchise tax law is void:

(a) The ad valorem assessment being in excess of true value for tax purposes, the franchise tax based thereon violates the Constitution of North Carolina and the Constitution of the United States.

(b) The so-called franchise tax is not a franchise tax, but is in fact an ad valorem tax. Since it is an ad valorem tax, it is void because not levied equally upon all property holders in the State, and is, therefore, contrary to Section 3 of Article 5 of the Constitution of North Carolina, and by reason of the enforcement thereof, plaintiff is deprived of the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States.

(c) If the so-called franchise tax is held to be a franchise tax and not a property tax, then it is unconstitutional and void, because it is a tax upon the privilege of engaging in interstate commerce and violates the Commerce Clause of the Constitution of the United States.

3. Plaintiff, at the time of filing its bill, made

application for an interlocutory injunction under Section 266 of the Judicial Code. The District Judge entered an order fixing October 6, 1921, for hearing the application for an interlocutory injunction and directing that not less than five days' notice be given the Governor and the State of North Carolina, and calling to his assistance to hear the application, Edmund Waddill, Jr., United States Circuit Judge, and Henry G. Connor, United States District Judge for the Eastern District of North Carolina, and giving notice of the hearing to all defendants.

4. October 6, 1921, the Three-Judge Court assembled, defendants filed a motion to dismiss bill, which was denied. The plaintiff, by its counsel, and the defendants, through the Attorney General of North Carolina, on October 6, 1921, entered into a stipulation, which stipulation was approved by the three-judge bench and filed as a part of the record in this cause. The plaintiff in the stipulation agreed to pay and has paid all taxes, other than the franchise tax, as they might come due on an assessed valuation of $1,975,806 (the assessment complained of as being excessive and otherwise void being $4,104,710.00). The defendants agreed not to demand or collect or begin proceedings of any character for the nonpayment of said taxes on any valuation in excess of said $1,975,806.00 "until the further order of the Court or pending this action." The Court

entered an order based upon the stipulation, reciting that the application for preliminary injunction had been continued by agreement of parties in order that the defendants might have time to answer and prepare their defense.

5. November 30, 1921, defendants filed their answer. Thereafter, plaintiff and defendants, within the time stipulated, filed affidavits in support of and against the application for interlocutory injunction.

6. January 24, 1922, the application for interlocutory injunction was heard by the Three-Judge Court, which took the matter under consideration and gave thirty days within which to file briefs.

7. March 18, 1922, the Three-Judge Court filed its per curiam opinion, which, without expression of reasons therefor, held that plaintiff had not made such a case as entitled it to an interlocutory injunction as prayed for and entered on the same day an order refusing and denying the injunction as prayed for. This order concluded as follows:

> "And it is further ordered that the defendants shall not proceed to enforce the collection of taxes involved in this litigation, for the period of thirty days from the date of this order, to the end that complainant may take such action in the premises as it is advised to."

8. March 31, 1922, plaintiff filed its petition

for appeal and for an order staying the proceedings pending appeal to the Supreme Court. This petition was continued at the request of the State, as shown by the Court's order, to April 10, 1922.

9. April 10, 1922, the Court granted the appeal, and ordered that plaintiff's petition for the further stay be continued for a hearing by the Three-Judge Court, this order recited that the appeal was without prejudice to plaintiff as to the later hearing of the matter of further stay asked for.

10. April 15, 1922, the Three-Judge Court denied the stay until the appeal could be decided by the Supreme Court, in the following language:

> "The Court, being of the opinion that the application to continue in effect the thirty-day stay granted March 16, 1922, until a review and decision can be had by the Supreme Court of the United States on the appeal heretofore taken from the order of this Court, denying the interlocutory injunction, should be presented to the Supreme Court of the United States, denies the application for continuance of said stay until the appeal is decided by the Supreme Court of the United States."

The Court extended the restraint of the State's officers ordered March 18, 1922, for thirty days, to May 15, 1922, in the following language:

> "And it appearing to the Court that the

hearing of this application has been delayed through no fault of plaintiff's, and the Court being of the opinion that the status quo should be continued until the application for restraint pending the appeal can be made to and decided by the Supreme Court of the United States, ORDERS that the defendants shall not proceed to enforce the collection of taxes involved in this litigation for the period of thirty days from the date of this order."

Plaintiff further shows the Court that unless the defendants are restrained pending the decision of this Court on the appeal taken under Section 266 of the Judicial Code from the order of the Three-Judge Court denying the interlocutory injunction, the State's officers will immediately collect the taxes in dispute and plaintiff's appeal to this Court from the order denying the restraint will be fruitless and irreparable injury will be done it. If this Honorable Court should hold on the appeal now pending here that plaintiff was entitled to an interlocutory injunction, restraining until the merits the collection of the taxes on the excess of the ad valorem assessment over the assessment paid on by stipulation in the record or under the void franchise tax law, the value of that decision would be lost to plaintiff, because the plaintiff will have paid the taxes to restrain which payment until decision on the merits the appeal is taken; and if at the trial on the merits the assessment is held void, plaintiff will suffer irreparable injury in that it will have to bring twenty-four suits to recover the taxes illegally

exacted and paid to the counties, cities and separate school districts in the State of North Carolina, and there is not any adequate remedy provided under the law of North Carolina for the recovery of the franchise tax, which is paid directly to the State's officers. On the contrary, if the State should win ultimately, it has a first lien on all of the property for the collection of said taxes, with such penalty or interest as the law may allow.

In support of this motion, plaintiff attaches hereto a copy of the record in this case on appeal to this Court for interlocutory injunction, which record by stipulation thereto attached is made the record on this motion.

Wherefore, plaintiff prays that the temporary restraint herein asked be granted.

ATLANTIC AND YADKIN RAILWAY COMPANY,

By S. R. PRINCE,

Its Attorney.

ATLANTIC AND YADKIN RAILWAY COMPANY,
Plaintiff,

vs.

A. D. WATTS, ET AL.,
Defendants.

It is agreed by the parties to this cause that the record on appeal from the order denying the interlocutory injunction may be considered as the record on hearing of the motion of appellant for stay of the proceedings until the said appeal can be heard and determined.

.....
Attorney for Appellant.

.....
Attorney for Appellee.

ATLANTIC AND YADKIN RAILWAY COMPANY,
Plaintiff,
vs.
A. D. WATTS, ET AL.,
Defendants.

The defendants will take notice that, on or before May 15 1922, the plaintiff will perfect its appeal of this suit to the Supreme Court of the United States, by filing the duly certified record thereof with the Clerk of said Court, and will thereafter, on the 15 day of May, 1922, about the hour of noon present to the Court in its court room in Washington, D. C., the foregoing motion for the maintenance of the status quo and temporary restraint of the State's tax officers pending the determination of its said appeal.

This 26 day of April, 1922.

(S) S K Vance
Attorney for Appellant.

Receipt is acknowledged of the foregoing notice and defendants waive any further or other notice thereof. This 27 day of April, 1922.

(S) Wm P. Bynum
Attorney for Appellee.

Office Supreme Court, U. S.
FILED
MAY 10 1922
WM. R. STANSBURY
CLERK

No. 980381

IN THE

SUPREME COURT OF THE UNITED STATES

SEABOARD AIR LINE RAILWAY COMPANY,
Appellant,

vs.

A. D. WATTS, ET AL.,
Appellees.

Motion for Temporary Restraining Order Pending Appeal to Supreme Court under Section 266 of the Judicial Code of the United States.

MURRAY ALLEN,
Counsel for Appellant

FORNEY JOHNSTON,
JAMES F. WRIGHT,
Of Counsel.

COMMERCIAL PRINTING COMPANY, RALEIGH, N. C.

IN THE

SUPREME COURT OF THE UNITED STATES

SEABOARD AIR LINE RAILWAY COMPANY,
Appellant,

vs.

A. D. WATTS, ET AL.,
Appellees.

Motion for Temporary Restraining Order Pending Appeal to Supreme Court under Section 266 of the Judicial Code of the United States.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes, now appellant, Seaboard Air Line Railway Company, by its counsel, representing to the Court that it has appealed to the Supreme Court of the United States from an order heretofore entered herein on March 18th, 1922, by the District Court of the United States for the Eastern District of North Carolina, denying appellant's application for an interlocutory injunction, which appeal has been allowed by said District Court and the record on said appeal has heretofore been filed and docketed in this Court, and respectfully moves the

Court to grant a temporary restraining order herein pending the hearing and decision of such appeal by this Court, and for grounds of its motion shows:

1. On November 20th, 1921, appellant (hereinafter called plaintiff) filed its bill in the United States District Court for the Eastern District of North Carolina, making as defendants thereto A. D. Watts, Commissioner of Revenue of the State of North Carolina, Baxter Durham, Auditor of the State of North Carolina, Benjamin R. Lacy, Treasurer of the State of North Carolina and James S. Manning, Attorney General of the State of North Carolina, and the sheriffs of the twenty-six counties in North Carolina through which appellant operates its railroad and in which it pays taxes, and sixty-nine tax collectors of the cities and towns and other governmental subdivisions through which appellant operates and in which it pays taxes. The necessity for having ninety-nine defendants was that the Revenue Commissioner certified the assessment complained of to the several counties, cities and school districts so soon after the fixing of the assessment that plaintiff had not an opportunity to enjoin the certification and therefore was compelled to enjoin the tax collecting officers of the State in each tax district from collecting taxes on the assessment which had been so certified.

2. The bill filed sought to enjoin the State's taxing officers

(1) from collecting property taxes upon an excessive ad valorem assessment of $34,834,685.00;

(2) from collecting a franchise tax under a void franchise tax law;

(3) from collecting a franchise or privilege tax based upon an excessive assessment of $34,834,685.00.

Ad Valorem Assessment. The ad valorem assessment, it was contended, was illegal for the following reasons:

(a) The assessment of plaintiff's property at $34,834,-685.00 is in excess of the true value in money of said property for tax purposes as the same is defined under the North Carolina law, and the collection of taxes thereon deprives plaintiff of the equal protection of the law, contrary to the Constitution of the United States.

(b) The North Carolina tax officials failed and refused to follow the method prescribed by the statutes of North Carolina for the assessment of the value of railroads, but assessed the property of plaintiff on a basis not authorized or sanctioned by the North Carolina statute, such basis being arbitrary and illegal and the assessment arrived at therefore invalid.

(c) The method of valuation for tax purposes followed by the tax officials of North Carolina imported into the State of North Carolina values which are elsewhere and thus violated the Commerce Clause of the Constitution of the United States.

(d) The County Boards of Review of twenty of the twenty-six counties through which plaintiff operates made horizontal reductions in the assessed value in said counties as a whole of real property varying from 1.1 per cent to 40 per cent, making an average reduction of approximately 22 per cent. The Revenue Commissioner declined to give to plaintiff similar horizontal reductions in plaintiff's right of way lands and structures thereon, situated in said counties. This was an illegal discrimination and this declination on the part of the Revenue Commissioner violated Section 3 of Article 5 of the Constitution of North Carolina and violated the Fourteenth Amendment to the Constitution of the United States.

(e) That the failure and refusal of the Commissioner of Revenue to grant the complainant a reduction in the assessment of its properties while the counties made a systematic reduction in the valuation of other real estate and property generally resulted in a discrimination against the complainant; and that such discrimination is in contravention of Section 3 of Article 5 of the Constitution of North Carolina and likewise denies the complainant the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

(f) That the Uniformity Clause of the North Carolina Constitution and the Fourteenth Amendment to the Constitution of the United States are violated in that complainant's property is assessed for taxation at its true value within the meaning of the statutes of North Carolina, or more than its true value, while the property of other taxpayers generally in the State is appraised and assessed for taxation at less than its true value and that this appraisal and assessment of the property of other citizens and taxpayers of the State has been long continued and is arrived at under a scheme of taxation which shows intent to place an undue burden of taxation upon complainant and its property.

(g) That the scheme of taxation of the State of North Carolina and the assessment of the properties of the various classes of taxpayers is by settled purpose and intent so designed and carried out that, while the property of complainant is assessed at its true value in money within the meaning of the tax statutes of North Carolina, or more than its true value, the large proportion of the property in the State is assessed at less than its true value in money, thereby casting an undue and excessive burden upon complainant, in violation of the Uniformity Clause of the Constitution of the State of North Caro-

lina and in violation of the Fourteenth Amendment to the Constitution of the United States.

Franchise Tax. The following are the grounds upon which plaintiff bases its contention that the franchise tax law is void:

(a) The ad valorem assessment being in excess of true value for tax purposes, the franchise tax based thereon violates the Constitution of North Carolina and the Constitution of the United States.

(b) The so-called franchise tax is not a franchise tax, but is in fact an ad valorem tax. Since it is an ad valorem tax, it is void because not levied equally upon all property holders in the State, and is therefore, contrary to Section 3 of Article 5 of the Constitution of North Carolina, and by reason of the enforcement thereof, plaintiff is deprived of the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

(c) If the so-called franchise tax is held to be a franchise tax and not a property tax, then it is unconstitutional and void, because it is a tax upon the privilege of engaging in interstate commerce, and violates the Commerce Clause of the Constitution of the United States.

(d) That if the franchise tax or privilege tax be imposed for the privilege of engaging in intrastate commerce, it is measured in part by the value of the privilege of engaging in interstate commerce, in that it is based upon the entire value, including values derived from use in interstate commerce, and is, therefore, a burden imposed upon interstate commerce, in violation of the Commerce Clause of the Constitution of the United States.

(e) That the payment of the so-called franchise or privilege tax is exacted as a condition precedent to the

right of complainant to do "any business" in the State, whether interstate or intrastate, and, therefore unconstitutional and void.

(f) That the assessment made is void, in that it includes in the value used as a basis for arrival at the franchise or privilege tax the value of property not used in the business for which the privilege is exacted, and such law and the enforcement thereof, in the manner set forth, violates the Fourteenth Amendment to the Constitution of the United States.

(g) That if the so-called franchise tax is a tax for the privilege of doing business it is void because under the tax system of the State of North Carolina which includes an ad valorem tax on the full value of its property in the State, including as a part thereof value it has due to its use in interstate commerce, plus a franchise or privilege tax upon the full value of the said property for ad valorem purposes, plus an income tax of three per cent on its net operating income, does in practical operation result in a burden upon interstate commerce, and violates the Commerce Clause of the Constitution of the United States.

(h) That the so-called franchise or privilege tax is levied upon an erroneous assessment of complainant's property, in that the said property is assessed at its true value under the tax laws of the State of North Carolina, whereas, the property of individuals and other corporations is assessed at less than its true value, and complainant has been illegally denied deductions in valuation allowed other corporations and individuals.

(i) That the so-called franchise or privilege tax is unconstitutional and void, in that the Legislature of North Carolina has not levied a tax on property for the support of the State government, as required by Section

3, Article 5, of the Constitution of North Carolina, but has attempted to secure the entire revenue for the support of the State government by franchise, income, inheritance and taxes of similar nature.

3. Plaintiff, at the time of filing its bill, made application for in interlocutory injunction under Section 266 of the Judicial Code. The District Judge entered an order fixing December 12th, 1921, for hearing the application for an interlocutory injunction and directing that not less than five days notice be given the Governor and the State of North Carolina, and calling to his assistance to hear the application, Edmund Waddill, Jr., United States Circuit Judge, and James E. Boyd, United States District Judge for the Western District of North Carolina, and giving notice of the hearing to all defendants.

4. By stipulation of counsel the hearing was continued to January 24th, 1922, at Greensboro, N. C., at which time the Three-Judge Court assembled, and defendants filed a motion to dismiss bill, which was denied. Counsel for plaintiff and defendants entered into a stipulation, which stipulation was approved by the Three-Judge Court and filed as a part of the record in this cause. The plaintiff in the stipulation agreed to pay and has paid all taxes, other than the franchise tax, as they might come due on an assessed valuation of $27,119,384.00 (the assessment complained of as being excessive and otherwise void being $34,834,685.00). The defendants agreed not to demand or collect or begin proceedings of any character for the non-payment of said taxes on any valuation in excess of said $27,119,384.00, "until the further order of the Court."

5. December 21st, 1921, defendants filed their answer. Thereafter, plaintiff and defendants, within the time stipulated, filed affidavits in support of and against the application for interlocutory injunction.

6. January 24th, 1922, the application for interlocutory injunction was heard by the Three-Judge Court, which took the matter under consideration and gave thirty days within which to file briefs.

7. March 18th, 1922, the Three-Judge Court filed its per curiam opinion, which, without expression of reasons therefor, held that plaintiff had not made such a case as entitled it to an interlocutory injunction as prayed for and entered on the same day an order refusing and denying the injunction as prayed for. This order concluded as follows:

> "And it is further ordered that the defendants shall not proceed to enforce the collection of taxes involved in this litigation, for the period of thirty days from the date of this order, to the end that complainant may take such action in the premises as it is advised to."

8. March 30th, 1922, plaintiff filed its petition for appeal and for an order staying the proceedings pending appeal to the Supreme Court.

9. April 15th, 1922, the District Court granted the appeal.

10. April 15th, 1922, the Three-Judge Court denied the stay until the appeal could be decided by the Supreme Court, in the following language:

> "The Court, being of the opinion that the application to continue in effect the thirty day stay granted March 18th, 1922, until a review and decision can be had by the Supreme Court of the United States on the appeal heretofore taken from the order of this Court, denying the interlocutory injunction, should be presented to the Supreme Court of the United States, denies the application for con-

tinuance of said stay until the appeal is decided by the Supreme Court of the United States."

The Court extended the restraint of the State's officers ordered March 18th, 1922, for thirty days, to May 15th, 1922, in the following language:

"And it appearing to the Court that the hearing of this application has been delayed through no fault of plaintiff's, and the Court being of the opinion that the status quo should be continued until the application for restraint, pending the appeal, can be made to, and decided by, the Supreme Court of the United States, ORDERS that the defendants shall not proceed to enforce the collection of taxes involved in this litigation for the period of thirty days from the date of this order."

11. Subsequent to the order referred to in the foregoing section, counsel for plaintiff and defendants entered into an agreement that the application of the plaintiff to the Supreme Court of the United States for a temporary restraining order herein, pending the hearing and decision of the appeal by the Supreme Court, from the order of the Three-Judge Court denying plaintiff's application for an interlocutory injunction, be submitted to the Supreme Court on May 15th, 1922, and that the status fixed by the order of the Three-Judge Court on April 15th shall continue until such application has been heard and determined by the Supreme Court.

12. Plaintiff further shows the Court that unless the defendants are restrained pending the decision of this Court on the appeal taken under Section 266 of the Judicial Code from the order of the Three-Judge Court denying the interlocutory injunction, the State's officers will immediately collect the taxes in dispute and plaintiff's appeal to this Court from the order denying the restraint will be fruitless and irreparable injury will be

done it. If this Honorable Court should hold on the appeal now pending here that plaintiff was entitled to an interlocutory injunction, restraining, until hearing on the merits, the collection of the taxes on the excess of the ad valorem assessment over the assessment on which taxes were paid by stipulation in the record, or under the void franchise tax law, the value of that decision would be lost to plaintiff, because the plaintiff will have paid the taxes to restrain which payment until decision on the merits the appeal it taken; and if at the trial on the merits the assessment is held void, plaintiffs will suffer irreparable injury, in that it will have to bring ninety-five suits to recover the taxes illegally exacted and paid to the counties, cities and separate school districts in the State of North Carolina, and there is not any adequate remedy provided under the law of North Carolina for the recovery of the franchise tax, which is paid directly to the State's officers. On the contrary, if the State should win ultimately, it has a first lien on all of the property of plaintiff for the collection of said taxes, with such penalty or interest as the law may allow, and consequently the interests of the State of North Carolina cannot be prejudiced.

In support of this motion, plaintiff refers to the record in this case on appeal to this Court for interlocutory injunction, which record by stipulation hereto attached is made the record on this motion.

Wherefore, plaintiff prays that the temporary restraint herein asked be granted.

MURRAY ALLEN,
Counsel for Plaintiff, Appellant.

FORNEY JOHNSTON,
JAMES F. WRIGHT,
Of Counsel.

North Carolina—Wake County.

Murray Allen, being duly sworn, says: That he is one of the counsel for appellant in the case of Seaboard Air Line Railway Company v. A. D. Watts, Commissioner of Revenue of North Carolina et als.; that the facts set forth in the foregoing motion are true of his own knowledge. MURRAY ALLEN.

Subscribed and sworn to before me this 5th day of May, 1922. J. A. SCOTT,

Notary Public.

My commission expires 2d day of May, 1924.

SEABOARD AIR LINE RAILWAY COMPANY,
Plaintiff,

vs.

A. D. WATTS, ET AL.,
Defendants.

The defendants will take notice that, on or before May 8th, 1922, the plaintiff will perfect its appeal of this suit to the Supreme Court of the United States, by filing the duly certified record thereof with the Clerk of said Court, and will thereafter on the 15th day of May, 1922, about the hour of noon, present to the Court, in its Court Room in Washington, D. C., the foregoing motion for the maintenance of the status quo and temporary restraint of the State's tax officers pending the determination of its said appeal.

This 6th day of May, 1922.

MURRAY ALLEN,
Counsel for Plaintiff.

Receipt is acknowledged of the foregoing notice and defendants waive any further or other notice thereof.

This 6th day of May, 1922.

JAMES S. MANNING,
Counsel for Defendants and Attorney General of N. C.

SEABOARD AIR LINE RAILWAY COMPANY,
Plaintiff,

vs

A. D. WATTS, ET AL.,
Defendants.

It is agreed by the parties to this cause that the record on appeal from the order denying the interlocutory injunction may be considered as the record on hearing of the motion of appellant for stay of the proceedings until the said appeal can be heard and determined.

MURRAY ALLEN,
Counsel for Plaintiff.

JAMES S. MANNING,
Counsel for Defendants and Attorney General of N. C.

Supreme Court, U. S.
FILED
NOV 6 1922
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

No. 381

SEABOARD AIR LINE RAILWAY COMPANY,
Appellant.

vs.

A. D. WATTS, COMMISSIONER OF REVENUE OF NORTH CAROLINA, ET AL.,
Appellees.

BRIEF OF APPELLANT

MURRAY ALLEN,
Counsel for Appellant.

ROBERT JOHNSTON,
JAMES F. WRIGHT,
Of Counsel.

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INDEX

PAGE

Statement of Case ---- 1
Specifications of Error ---- 7
Arugment ---- 10
I. Principles governing issuance of Interlocutory Injunction ---- 12
II. The Tax Laws of North Carolina by necessary construction, create an unlawful discrimination in the assessment of complainant's property for taxation ---- 16
III. The Tax Laws of North Carolina as administrated create an unlawful discrimination against complainant in that they deny complainant equality and uniformity in the taxation of its property ---- 21
IV. The collection of taxes based upon an assessment which denies a tax payer equality and uniformity in taxation will be enjoined ---- 28
1. The assessment casts a cloud upon complainant's title ---- 40
2. Complainant has no adequate remedy at law ---- 41
3. If complainant is required to pay its taxes under protest and sue to recover back this will lead to a multiplicity of suits ---- 46
4. Complainant will suffer irreparable damage ---- 49
V. The Franchise Tax is unconstitutional and void ---- 50
First: It is not a franchise tax but an ad valorem tax and is not levied on other property ---- 51
Second: It is levied on an erroneous assessment ---- 52
Third: It is a burden on interstate commerce ---- 52
Appendix ---- 61

TABLE OF CASES CITED.

PAGE

Allen v. Pullman Co., 191 U. S., 171 55
Allen v. B. & O. R. R. Co., 114 U. S., 311 45
Assessors v. Pullman Co., 60 Fed. Rep., 37 43
Ayers, In re, 123 U. S., 500 45
Bank v. Mylin, 76 Fed., 385 46
Barrett v. New York, 232 U. S., 14 54
Bickett v. Tax Commission, 177 N. C., 436 57
Boyer v. Boyer, 113 U. S., 689 34
Bridge Co., Ex parte, 62 Ark., 461 30
Bureau County v. C. B. & Q. R. Co., 44 Ill., 229 36
Burroughs on Taxation, p. 169 51
C. B. & Q. R. Co. v. Board of Equalizers, 67 Fed., 411 30
C. M. & St. P. Ry. Co. v. Kendall, 278 Fed., 298 31
Cohen v. Delavina, 104 Fed., 946 14
Colorado Eastern R. Co. v. C. B. & Q. Ry. Co., 141 Fed., 898 (C. C. A.) 14
Commissioners v. Tobacco Co., 116 N. C., 446 56
Cooley on Taxation, 780 41
County of San Mateo v. Railroad, 13 Fed., 722 31
County of Santa Clara v. Railroad, 18 Fed., 385 31
Cummings v. Nat. Bank, 101 U. S., 153 ..... 29, 30, 31, 34, 43, 45
Crutcher v. Kentucky, 141 U. S., 47 55
Cyc., Vol. 37, p. 1264 37
Dane v. Jackson, 41 U. S., Sup. Ct. Rep., 566 29
Dundee M. & T. Co. v. School Dist., 21 Fed. Rep., 151 31
Dundee M. & T. Co. v. Parrish, 24 Fed., 197 35
Dodge v. Nat. Bank, 109 Fed., 726 55
Elliott on Railroads, (2d. Ed.) Sec. 751-b 37
Elliott on Railroads, (2d. Ed.) Sec. 751 43
Foster's Fed. Prac., Vol. 1, Sec. 209 43
Fargo v. Hart, 193 U. S., 490 48
Gage v. Kaufman, 133 U. S., 471 41
G. H. & S. A. R. Co. v. Texas, 210 U. S., 217 ..... 51, 53, 55
Gregg v. Sanford, 65 Fed., 151 46

PAGE

Greene v. L. & I R. R. Co., 244 U. S., 499----30
Guano Co. v. Biddle, 158 N. C., at p. 212----57
Hagood v. Southern, 117 U. S., 71----45
Hills v. Exchange Bank, 105 U. S., 319, 322----43
Insurance Co. v. Bailey, 13 Wal., 616----40
Irving v. Carpenters & Joiners of America, 180 Fed., 896----14
Judson on Taxation (2d Ed.) 232----54
Joplin etc. Ry. Co. v. Public Service Commission of Missouri, 267 Fed., 584----13
Kansas City Ry. Co. v. Kansas, 240 U. S., 227----53
Kemmerer v. Midland Oil & Drilling Co., 229 Fed., 872----13
Kryptok Co. v. Stead Lens Co., 190 F., 767----13
Kyle v. Commissioners, 75 N. C., at p. 446----56
Lacy v. Packing Co., 134 N. C., 573----57
Lindsay v. Bank, 156 U. S., 485, 494----45
Long v. Watts (N. C.), 110 S. E., 765----46
Louisville Trust Co. v. Stone, 107 Fed., 305----32
L.& N. R. R. Co. v. Greene, 244 U. S., 522----40
L. & N. R. R. Co., v. Gaines, 3 Fed. Rep., 266----44
Lyon v. Alley, 130 U. S., 177, 187----41, 43
Ludwig v. Telegraph Co., 216 U. S., 146----55
McGahey v. Virginia, 135 U. S., 676----45
Nashville, etc., R. Co. v. Taylor, 86 Fed., 168----32
National Bank v. Kimball, 103 U. S., 732----34
Nulomoline Co. v. Stromeyer, 240 F., 228----12
Ogden City v. Armstrong, 168 U. S., 224----43
Ohio River & W. R. Co. v. Dittey, 232 U. S., 576----41
Oklahoma v. Wells Fargo & Co., 223 U. S., 298----54, 55
Pelton v. Nat. Bank, 101 U. S., 143----31, 34, 43
Pingree v. Auditor General, 120 Mich., 95----52
Pittsburg etc. Ry. v. Board of Public Wks., 172 U. S., 32----46
Pomeroy Eq. Jur., (3d Ed.) p. 418----47
Pomeroy Eq. Jur., (3d Ed.) Sec. 1345----41
Porter v. Langley, (Texas) 155 S. W., 1043----30
Postal Co. v. Richmond, 99 Va., 102----54
Postal Telegraph & Cable Co. v. Adams, 155 U. S., 688----53

PAGE

Provident Institution v. Massachusetts, 6 Wall., 611 52
Pullen v. Corporation Commission, 152 N. C., 553 56
Pyle v. Brenneman, 122 Fed., 787 ..... 48, 50
Railroad & Telephone Companies v. Board of Equalizers, 85 Fed., 302 13
Railroad Commission of Lousiana v. Texas & Pacific Ry. Co., 144 Fed., at p. 73 14
Railroad v. Commissioners, 72 N. C., 10 57
Railroad v. Newbern, 147 N. C., at p. 165 57
Raymond v. Chicago Union Traction Co., 207 U. S., 20 ..... 22, 31, 32, 40, 48, 50
Reagan v. Farmers' Loan & Trust Co., 154 U. S., 362 ..... 22, 31
Redmond v. Commissioners, 106 N. C., 122 58
Ruling Case Law, Vol. 14, p. 357 13
Ruling Case Law, Vol. 26, p. 35 52
St. L. & S. W. Ry. Co. v. Arkansas, 235 U. S., 350 ..... 51, 54, 55
Sanford v. Poe, 69 Fed., 546 47
Seaboard Air Line Ry. Co. v. R. R. Commission of Ala., 155 F., 792 14
Shelton v. Platt, 139 U. S., 591 43
Sherrod v. Dawson, 154 N. C., 525 43
Shubert v. Woodward, 167 Fed., 47 14
Singer Sewing Machine Co. v. Benedict, 229 U. S., 481 41
Smith v. Wilkins, 164 N. C., 140 57
Southern Ry. Co. v. Asheville, 69 Fed., 360 45
Southern Ry. Co. v. N. C., Corporation Commission, 99 Fed., 162 15
Spelling on Extraordinary Remedies, Sec. 642 40
Spelling on Extraordinary Remedies, Sec. 649 37
Spelling on Extraordinary Remedies, Sec. 665 .....
Stanley v. Supervisors, 121 U. S., 535 ..... 34, 37
State v. Stonewall Ins. Co., 89 Ala., 335 52
Taylor v. Louisville & N. Ry. Co., 88 Fed., 350 ..... 36, 46
Trustees of Railroad v. Guenther, 19 Fed., 395 ..... 30, 34
Tyler, In re, 149 U. S., 164 ..... 44, 46
Tyler v. Savage, 143 U. S., 79 43

PAGE

Union Pacific Ry. v. Cheyenne, 113 U. S., 516----------41, 43
Webster v. Bell, 68 Fed., 183----------54
Wells, Fargo & Co. v. Nevada, 248 U. S., 165----------53, 55
Western Union Tel. Co. v. Kansas, 216 U. S., 1----------55
Western Union Tel. Co. v. Norman, 77 Fed., 13----------47

EXTRACTS FROM CONSTITUTION AND STATUTES OF NORTH CAROLINA

Constitution:
Article 5, Sec. 3 (Appendix, p. 61)----------29, 55
Article 7, Sec. 9 (Appendix, p. 61)----------29, 58, 59
Statutes:
Machinery Act of 1921, Chapter 38, Public Laws of N. C., 1921
Section 28 (a) (Appendix, p. 62)----------4, 19, 20
Section 28 (e) (Appendix, p. 63----------2, 21
Section 28 (g) Appendix, p. 64)----------5, 19, 20
Section 64 (Appendix, p. 64----------2
Section 65 (Appendix, p. 65----------20
Section 98 (Appendix, p. 65)----------20
Revenue Act of 1921, Chapter 34, Public Laws of North Carolina of 1921.
Section 3 (Appendix, p. 62)----------55
Section 82 (6½) (Appendix, p. 68)------3, 6, 50, 54
Chapter 40, Public Laws of North Carolina of 1921, (Appendix, p. 66)----------3, 19, 20
Revaluation Act, Chapter 84, Public Laws of North Carolina of 1919.
Section 5----------23
Consolidated Statutes, Sec. 858----------42
Consolidated Statutes, Sec. 7979----------43

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No 381

SEABOARD AIR LINE RAILWAY COMPANY

Appellant.

against

A. D. WATTS, COMMISSIONER OF REVENUE OF NORTH CAROLINA, AND OTHERS

Appellees.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE

This is an appeal by Seaboard Air Line Railway Company, from an order of the United States District Court for the Eastern District of North Carolina denying an application under Section 266 of the Judicial Code for an interlocutory injunction. The opinion of the three judges and the order will be found in the printed record at pages 95 and 98.

For the year 1919 the ad valorem assessment of the properties of complainant in the State of North Carolina was $20,191,720.00. In 1920 the State Tax Commission, under the Revaluation Act (Chapter 84, Public Laws of North Carolina, 1919) increased the assessment of said property for 1920 to $34, 768,440.00, and complainant paid its taxes thereon to the State Treasurer under written protest. In 1921 the Revenue Com-

missioner assessed said properties at $34,834,685.00. Complainant filed objections to the assessment, and a hearing was had before the Revenue Commissioner and facts adduced tending to show that said valuation was in excess of the true "actual value" of the property as the said term is defined in Section 28 (e) of the Machinery Act, reading in part as follows:

> "The words 'actual value,' as used in the several subdivisions of this section, shall be held to mean the true and actual value of the property if sold in the manner in which such property is usually sold, but not by forced sale thereof, and shall be held and deemed to mean what the property would bring at cash sale when sold in such manner as such properties are usually sold."

This hearing resulted in the Revenue Commissioner adhering to the assessment of complainant's property at $34,834,685.00. The complainant petitioned the Revenue Commissioner for a review of the assessment of its property by the State Board of Equalization. The Revenue Commissioner, under advice of the Attorney General, held that the complainant and other railroads had no appeal to the State Board of Equalization or any other body, but he reheard the matter himself and declined to change said assessment. However, on or about November 21st, 1921, the Commissioner of Revenue changed the assessment from $34,834,685.00 to $34,768,440.00.

Prior to the commencement of this action, the Commissioner of Revenue allocated to the counties, cities, towns and other local taxing districts their proportionate part of this valuation, under the provisions of Section 64 of the Machinery Act, (Appendix page 64) and the taxing authorities were preparing to collect taxes on the basis of the apportionments certified by the Commissioner of Revenue.

On December 1st, 1921, the Seaboard Air Line Railway Company filed its bill of complaint in the United States District Court for the Eastern District of North Carolina, making defendants thereto A. D. Watts, Commissioner of Revenue of

North Carolina, Benjamin R. Lacy, State Treasurer of North-Carolina, Baxter Durham, State Auditor of North Carolina, James S. Manning, Attorney General of North Carolina, and the tax officials in 26 counties, 63 cities and towns, 3 townships, and 3 special school tax districts, to enjoin the collection of taxes on the assessment which had bee ı certified by the Commissioner of Revenue.

The bill also sought to enjoin the collection by the State taxing authorities of a franchise or privilege tax of one-tenth of one per cent. on the valuation of $34,768,440.00, under the provisions of Section 82 (6½) of the Revenue Act of 1921 (Appendix page 68).

At the time of the increase in the assessment of complainant's property from $20,191,720.00 to $34, 768,440.00 by the State Tax Commission, there was a general revaluation of property for taxation in the State of North Carolina, and an effort had been made to tax all property at its true value and on an equal basis. This revaluation was made under the provisions of Chapter 84, Public Laws of North Carolina, 1919, known as the Revaluation Act. This act provided that all property real, personal and mixed should be valued according to its true value in money as of the first day of May, 1919, and that the valuation when completed should become the value for tax purposes for the years 1920, 1921, 1922 and 1923.

Acting under this statute, the property in every county in the State was revalued for the purposes of taxation and assessed according to its "true value in money" as of May 1st, 1919.

The Legislature of Nortth Carolina of 1921 enacted a statute (chapter 40, Public Laws of 1921, Appendix page 66), creating the office of Commissioner of Revenue and transferring the powers and duties of the State Tax Commission to such Commissioner of Revenue. After this enactment, the Commissioner of Revenue became the assessing officer for railroad property, and by this same act the powers and duties of the State Tax Commission as a board of equalization were transferred to a State Board of Equalization composed of the Commissioner of

Revenue, the Chairman of the State Corporation Commission and the Attorney General.

The Legislature of 1921, by the provisions of Section 28 (a) of the Machinery Act, (Appendix page 62) provided that the Board of County Commissioners and County Board of Appraisers and Review should meet jointly in each county in the State on the first Tuesday after the first Monday in April, 1921, as a County Board of Review, to determine if the value of real property, as fixed under the Revaluation Act in the county as a whole, was in excess of the fair value of such property at the time of the meeting of such board, and this board was given the power to find the average percentage of such excess in the county as a whole and to reduce the assessment of all the property in the county to the extent of such average percentage.

The reductions made in the assessment of real property in twenty of the twenty-six counties in which complainant operates its line of railroad for the year 1921, under the valuation and assessment of the year 1920, are as follows:

Anson	20% and 10% in towns
Bertie	25%
Bladen	15%
Chatham	25%
Cleveland	15%
Durham	25%
Franklin	40%
Gaston	25%
Granville	33 ⅓%
Halifax	40%
Lee	33 ⅓%
Lincoln	35%
Mecklenburg	25%
Northampton	33 ⅓%
Rutherford	10%
Union	25%

Vance	33 ⅓%
Warren	33 ⅓%
Robeson	40%
Scotland	1.1%

The County Boards of Review in the Counties of Brunswick, Columbus, Moore, New Hanover, Richmond and Wake, in which complainant also operates its line of railroad, made no reduction in the 1920 assessment.

The authority of the County Boards of Review to make a percentage reduction on the assessment of other property under Section 28 (a) of the Machinery Act of 1921, did not extend to the property of railroads, and, therefore, the complainant did not get the benefit of the percentage reduction made in the assessment of other property in the counties in which complainant operates its railroad lines.

The Machinery Act of 1921, Section 28 (g) (Appendix page _____) provided that any taxpayer owning property assessed originally by the State Tax Commission (this authority was subsequently transferred to the Commissioner of Revenue) might make application to the State Tax Commission for a review of the assessment of his property in the same manner provided for complaint by property owners before the County Boards, and the State Tax Commission (Commissioner of Revenue) was given authority to hear and determine complaints. The assessment of railroad property was made originally by the State Tax Commission and this made it necessary, under Section 28 (g) of the Machinery Act of 1921, for the complainant to apply to the Commissioner of Revenue for a review of its assessment. This application was made and at the hearing before the Commissioner of Revenue complainant contended that it should be given the benefit of the average percentage of reduction made in the assessment of property other than that of railroads in the several counties in which complainant operated its lines of railroad. The Commissioner of Revenue refused to give the complainant the benefit of this reduction and

refused to make any reduction in the assessment of complainant's property.

The complaint filed in this cause attacks the assessment of complainant's property upon the ground that the tax laws of North Carolina create an illegal discrimination against complainant, in that complainant's property is assessed at its true value or more than its true value as defined by such laws and other property is assessed at less than its true value, and upon the further ground that the tax laws of the State of North Carolina have been so administered as to result in the systematic valuation of property other than that of railroads at less than its true value, while the property of complainant and other railroads is assessed at its true value as defined by the tax laws of the State. It is alleged in the complaint and supported by affidavits that the conditions which were considered as having brought about the reduced value of other property applied with equal or greater force to the property of complainant and other railroads.

The complainant also attacks the fanchise tax of one-tenth of one per cent, on the assessed value as being unconstitutional and void. This tax is imposed by Section 82 (6½) of the Revenue Act of 1921 (Appendix, page 68).

The defendants filed answer on December 21st, 1921, denying that there was any discrimination in the assessment of complainant's property for taxation and asserting that it was assessed at its true value in 1920, and that there had been no reduction in such value in 1921, and denying that the franchise tax was void.

At the time of filing its bill, complainant made application for an interlocutory injunction under Section 266 of the Judicial Code and entered into a stipulation by which complainant agreed to pay its taxes on an assessment of $27,119, 384.00, and it was agreed, in consideration of such payment, that the defendants would not undertake to collect taxes on any greater valuation pending the hearing of complainant's application for a temporary injunction.

On January 24th, 1922, the application for an interlocutory injunction was heard by Circuit Judge Waddill and District Judges Boyd and Connor, and an order was entered March 19th, 1922, denying the interlocutory injunction, and from this order the complainant appealed to this Court.

On March 30th, 1922, complainant filed its petition for an appeal and for an order staying the proceedings pending appeal to the Supreme Court. The appeal was granted, but the stay of proceedings was denied and complainant thereafter filed a petition in the Supreme Court asking that the defendants be restrained from collecting taxes of complainant pending the decision of the appeal by the Supreme Court. This Court, on May 29th, 1922, denied the motion for a stay with leave to apply to the District Court, and application was made to the Three-Judge Court and the stay was granted in July, 1922.

SPECIFICATIONS OF ERROR

The appellant specifies as error in the judgment and opinion of the Court the following:

1. In decreeing that the interlocutory injunction be denied.

2. In holding that for the purpose of the motion for an interlocutory injunction only, complainant neither in its pleadings, nor upon the proof adduced, is entitled to have the interlocutory injunction applied for.

3. In failing to hold that the assessment of plaintiff's property for taxation is in excess of the true "actual value" of the said property as defined by the tax laws and as required by the Constitution of North Carolina, and is, therefore, invalid.

4. In failing to hold that the assessment of plaintiff's property for taxation is not made in accordance with the provisions of the Constitution and statutes of North Carolina, and that said assessment is invalid.

5. In failing to hold that the manner and method by which plaintiff's property was assessed is illegal and operates as an unjust and unlawful discrimination against plaintiff, in viola-

tion of the provisions of the Fourteenth Amendment to the Constitution of the United States, and that thereby plaintiff is deprived of its property without due process of law and denied the equal protection of the law.

6. In failing to hold that the action of the Commissioner of Revenue, in declining to make a reduction in the value of plaintiff's property, commensurate with the horizontal reductions made by the taxing authorities under the North Carolina law permitting such reductions on other property generally, was unjust discrimination, contrary to the Uniformity Clause of the Constitution of North Carolina and the Fourteenth Amendment of the Constitution of the United States.

7. In failing to hold that the Uniformity Clause of the North Carolina Constitution and the Fourteenth Amendment to the Constitution of the United States are violated, in that plaintiff's property is alleged by the State to be assessed at its true value for taxation, while the property of other taxpayers generally in the State is appraised and assessed for taxation at less than its true value in money and that this appraisal and assessment of the property of other citizens and taxpayers of the State has been long continued and is arrived at under a scheme of taxation which shows intent to place an undue burden of taxation upon plaintiff and its property.

8. In failing to hold that the scheme of taxation of the State of North Carolina and the assessment of the properties of the various classes of taxpayers is by settled purpose and intent so designed and carried out that, while the property of plaintiff is assessed at its true value in money, or more than its true value in money, the large proportion of the property in the State is assessed at less than its true value in money, thereby casting an undue and excessive burden upon plaintiff, in violation of the Uniformity Clause of the Constitution of the State of North Carolina and in violation of the Fourteenth Amendment to the Constitution of the United States.

9. In failing to hold that the ad valorem assessment being

in excess of true value for taxation, the so-called Franchise tax based thereon violates the Constitution of North Carolina and the Constitution of the United States.

10. In failing to hold that the so-called Franchise or Privilege tax is in truth and in fact an additional ad valorem or property tax upon plaintiff's property and is illegal and invalid because levied for the support of the State and is not levied equally upon the property of other citizens and taxpayers of the State, and the enforcement of such void statute deprives plaintiff of its property without due process of law, contrary to the Constitution of the United States.

11. In failing to hold that the so-called Franchise or Privilege tax is under the statute imposed as a license or privilege tax for the privilege of engaging in inter and intrastate commerce, and is therefore a burden upon interstate commerce, in violation of the Commerce Clause of the Constitution of the United States.

12. In failing to hold that, if the Franchise or Privilege tax be imposed for the privilege of engaging in intrastate commerce, it is measured in part by the value of the privilege of engaging in interstate commerce, in that it is based upon the entire value, including values derived from use in interstate commerce, and is, therefore, a burden imposed upon interstate commerce, in violation of the Commerce Clause of the Constitution of the United States.

13. In failing to hold that the payment of the so-called Franchise or Privilege tax is exacted as a condition precedent to the right of plaintiff to do "any business" in the State, whether interstate or intrastate, and, therefore, unconstitutional and void.

14. In failing to hold that the assessment made is void, in that it includes in the value used as a basis for arrival at the Franchise or Privilege tax the value of property not used in the business for which the privilege is exacted, and such law and the enforcement thereof, in the manner set forth, violates the

Fourteenth Amendment to the Constitution of the United States.

15. In failing to hold that the tax system of the State of North Carolina, which includes an ad valorem tax on the full value of its property in the State, including as a part thereof value it has due to its use in interstate commerce, plus a franchise or privilege tax upon the full value of the said property for ad valorem purposes, plus an income tax of three per cent. on its net operating income, does, in practical operation, result in a burden upon interstate commerce, and violates the Commerce Clause of the Constitution of the United States.

16. In failing to hold that the so-called Franchise or Privilege tax is levied upon an erroneous assessment of plaintiff's property, in that the said property is assessed at its true value, or more than its true value, whereas, the property of individuals and other corporations is assessed at less than its true value, and plaintiff has been illegally denied deductions in valuation allowed other corporations and individuals.

17. In failing to hold that the so-called Franchise or Privilege tax is unconstitutional and void in that the Legislature of North Carolina has not levied a tax on property for the support of the State government, as required by Section 3, Article 5, of the Constitution of North Carolina, but has attempted to levy revenue for the support of the State government by franchise, income, inheritance and taxes of similar nature.

ARGUMENT

This is a suit in equity to enjoin:

1. The collection of taxes for the year 1921, levied by the counties, cities and towns of the State of North Carolina on the assessment of complainant's property made by the State Tax Commission for the year 1920 and approved by the Commissioner of Revenue for the year 1921, upon the ground that the said assessment is in contravention of the Constitution of

North Carolina and the Constitution of the United States, because:

(a) The statutes of North Carolina authorizing a horizontal reduction in the assessed value of property other than that of railroads with no provision for a horizontal reduction in the assessment of railroad property creates a system which results in the valuation of the property of complainant at its true value or more than its true value, as defined by the tax laws of the State of North Carolina, and the valuation of property other than that of railroads at less than its true value, thereby creating an illegal discrimination against complainant.

(b) The laws for the assessment of property for taxation in the State of North Carolina have been so administered as to result in the systematic valuation of property other than that of railroads at less than its true value, while the property of complainant and other railroads is valued at its true value or more than its true value as defined by the tax laws of North Carolina.

(c) The assessed value of property other than that of railroads was reduced by the county appraisers in sixty seven counties with the approval of the State Board of Equalization, whereas the Commissioner of Revenue, to whom complainant applied for reduction in its assessed value, refused to make any reduction, notwithstanding the conditions which were considered as having brought about the reduced value of other property applied with equal or greater force to the property of complainant.

2. The collection of a tax of one-tenth of one per cent on the assessed value of the property of complainant upon the ground that the said tax is in contravention of the Constitution of North Carolina and the Constitution of the United States, because:

(a) It is not a franchise tax, but an ad valorem tax and is not levied on other property.

(b) It is levied on an invalid assessment.

(c) It is a burden on interstate commerce.

(d) The legislature has not levied a tax on property for state purposes as required by section 3 of Article 5 of the Constitution of North Carolina, and a system of taxation which attempts to raise revenue for state purposes entirely from other sources is subversive of both the letter and spirit of Section 3 of Article 5 of the Constitution of North Carolina.

Upon reading the allegations of the bill of complaint which relate particularly to the assessment of complainant's property for taxation, it will be found that the bill contains averments which are entirely sufficient, when supported by affidavits as they are, to sustain the complainant's right to the relief prayed for. We call special attention to the averments of Section 7 and the concluding paragraph thereof as follows:

> "The complainant avers that the failure and refusal of the Commissioner of Revenue to grant the complainant a reduction in the assessment of its properties while the counties made a systematic reduction in the valuation of other real estate and property generally resulted in a discrimination against the complainant; and complainant avers that such discrimination is in contravention of Section 3 of Article 5 of the Constitution of North Carolina and likewise denies the complainant the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States." (Printed Record, page 16.)

I

PRINCIPLES GOVERNING ISSUANCE OF INTERLOCUTORY INJUNCTION

> "On a motion for an interlocutory injunction, the question is not what relief plaintiff may be able to prove itself entitled to after final hearing, but what relief it is then entitled to in order to make the anticipated relief effective."
>
> Nulomoline Co. v. Stromeyer, 240 F., 228.

"A temporary injunction may be issued to maintain the *status quo* pending a final hearing where the questions of law and fact are intricate and difficult and where the rights of all parties can be easily safeguarded if the injunction is wrongfully issued, while the injury to complainant would be irreparable if the injunction were wrongfully denied."

Joplin etc. Ry. Co. v. Public Service Commission of Missouri, 267 Fed., 584.

Granting of an interlocutory injunction rests in the sound discretion of the court, which may take into consideration the relative damage which the respective parties will sustain if it be granted or refused.

Kemmerer v. Midland Oil & Drilling Company, 229 Fed., 872.

In Kryptok Co. v. Stead Lens Co., 190 Fed., 767, Sanborn, Circuit Judge, says: "The grant of a preliminary injunction rests in the discretion of the trial Court, not in its arbitrary, whimsical will, but in its sound judicial discretion, informed and guided by the established principles, rules, and practice of equity jurisprudence."

In 14 Ruling Case Law, page 357, it is said:

"Established principles of equity jurisprudence are . . . (2) that where the injury to the applicant if the preliminary injunction is refused will probably be greater than the injury to the opponent if it is granted, it should be issued."

If complainant has made out a *prima facie* or probable right to the injunctive relief, temporary injunction should be granted.

Railroad & Telephone Companies v. Board of Equalizers, 85 Fed., 302.

"When a bill is presented asserting claims involving grave questions of law and disputed issues of fact, which the court must decide before rendering a final decree, it is

within the sound judicial discretion of the trial court to preserve the existing status until the case is finally decided, whenever that course is necessary to fully protect the plaintiff or to sustain the jurisdiction of the court. Especially is this true in cases where defendant can be fully protected against any loss by the court's requiring of plaintiff a proper and adequate bond."

Railroad Commission of Louisiana v. Texas & Pacific Ry. Co., 144 Fed., at p. 73.

"Where injury to the moving party will be immediate and great, while the loss to the opposing party will be comparatively small and susceptible of indemnification by bond, and the questions are grave, a temporary injunction will be granted."

Shubert v. Woodward, 167 Fed., 47.
Seaboard Air Line Ry. Co. v. R. R. Commission of Ala., 155 Fed., 792.
Cohen v. Delavina, 104 Fed., 946.

"All that is needed in a preliminary injunction is to satisfy that a cause of action exists and that irreparable injury will be done the complainants unless they are protected. In such a case a preliminary injunction ought to issue."

Ward, Circuit Judge, in Irving v. Carpenters & Joiners of America, 180 Fed., 896.

"The granting of a temporary injunction does not determine the rights of the parties. The court need be satisfied no further than of a probable right and a probable danger, and that such right may be defeated without the interposition of a restraining order, and that the granting of such order will probably be attended with less injury to the respondent than to the complainant."

Colorado Eastern R. Co. v. C. B. & Q. Ry. Co., 141 Fed., 898. (C. C. A.)

We submit that the verified bill and the affidavits filed by complainant showing the undervaluation of property other than that of railroads, and showing the depreciation in value of complainant's property, which have not been answered by the defendants, are sufficient to establish complainant's right to have the status quo maintained until the hearing on the merits.

As to the franchise tax, we submit that the facts before the court establish its invalidity and upon the record as it now stands complainant is entitled to a perpetual injunction.

In *Southern Ry. Co. v. N. C. Corporation Commission*, 99 Fed., 162, Circuit Judge Simonton was confronted with the same situation presented here and he disposed of it in the following language:

> "In the argument of the case in this court, four grounds were taken against the constitutionality of the action of the corporation commission: (1) It was denied that it had any power to levy the assessment complained of. (2) It was alleged that the method adopted for assessing the value of railroad property differs so materially from that provided for assessing other property in the State of North Carolina, as to deny the complainants the equal protection of the law. (3) That there has been in the State of North Carolina a systematic and intentional undervaluation of real and personal property, other than railroad property, with the design to discriminate against railroads, and to cast upon them an undue share of the burdens of taxation, for the purpose of relieving other property of its just proportion of state taxation. (4) That, there being this systematic and intentional undervaluation of real and personal property other than railroad property, the property of complainants has been valued higher than that of individuals.
>
> The first ground has been passed upon, and, in deference to the decisions of the Supreme Court of North Carolina, it is not sustained.
>
> The three other grounds present Federal questions, de-

pendent upon issues both of fact and of law. An examination of the affidavits filed leads to no satisfactory conclusion or to an inclination of opinion. They will be referred."

II

THE TAX LAWS OF NORTH CAROLINA BY NECESSARY CONSTRUCTION CREATE AN UNLAWFUL DISCRIMINATION IN THE ASSESSMENT OF THE COMPLAINANT'S PROPERTY FOR TAXATION.

In the report of the State Tax Commission to Governor Bickett of August 10th, 1920, this language is used in the opening paragraph:

> "In our recommendations to the regular session of the General Assembly in 1919, with respect to the regular quadrennial revaluation of property then impending, the only recommendation presented with the confidence of positive conviction was that the General Assembly should provide an absolute standard of value to be applied alike to all classes of property in all counties; that it should not be further left to the conjecture of each taxpayer, and each assessing officer in each county to determine with varying opinion the standard of value by which they should be taxed. After the most thorough consideration the opinion became general that there should be no further temporizing with the troublesome question, and the act which became Chapter 84 of the Public Laws of 1919, known as the Revaluation Act, and establishing a 100 per cent basis of value, was enacted by the unanimous vote of the General Assembly.
>
> The general supervision and enforcement of this law was entrusted to the State Tax Commission. We have the honor to report the successful completion of this work, and present herewith the tabulated results with the hope and confidence that after it has been subjected to careful

analysis it may meet approval with the same unanimity with which the work was instructed to be done." (Printed Record, p. 76.)

In the report from which this quotation is made the eminent justice and fairness of revaluation to the taxpayers of North Carolina of every kind and character is set out at great length and in minute detail, and it appears that, for the first time in the history of the state, equality in taxation had been translated from a dream into a reality. The complainant in this case rejoiced with the Tax Commission in this wonderful accomplishment, and accepted without complaint other than a formal protest the increase in the value of its property from $20,191,720.00 to $34,768,440.00. It is true that this did not represent as great an increase in value as the average increase in other property. This is explained by the Tax Commission in its report to the Governor in these words:

> "The new assessment of railroads does not represent as great an increase as the average increase of other property, for the reason that they were assessed relatively higher than other property before, but we anticipate that it will meet the fair demands of public opinion when it is known that they are assessed like other property at their full value, and upon a valuation quite as high as that upon which they are asking to be permitted to earn a return." (Printed Record, p. 82.)

There is an apparent fallacy in the argument of counsel for defendants (See answer, Sec. 7, Printed Record, p. 39) that because other property was increased in many instances as much as 300 per cent and the property of railroads only 100 per cent, that therefore no discrimination can result from a reduction in other values. This situation results from the fact that for years the property of the railroads has been assessed at a much higher percentage of its true value than other property. It is stated in the answer, (Printed Record, p. 42), that in the year 1919 real estate in the twenty-six counties

in which the Seaboard operates its line of railroad was assessed for taxation at $131,359,584.00, whereas the true value of such real estate as fixed by the appraisers under the Revaluation Act as of May 1, 1919, was $511,121,682.00, showing a ratio of assessed to true value of 25.9 per cent, and the property of the Seaboard was assessed in 1919 at $20,191,720.00, and under the Revaluation Act it was assessed as of May 1, 1919, at $34,768,440.00, showing a ratio of 58 per cent. It, therefore, required an increase of more than 300 per cent in the value of the real estate and less than 100 per cent in the value of the Seaboard's property to place the assessed values on a basis of equality. It is manifestly illogical to say that no discrimination can result from a decrease in the assessed value of other property, without a corresponding decrease in the property of complainant.

The satisfaction with the new-born equality in the distribution of the burden of taxation was short lived. It appeared that the railroads paid less taxes in 1920 than they paid in 1919, thereby deriving a measure of recompense for the long years of inequality in the burden of taxation to which they had been subjected. This unexpected development of the Revaluation Act has been met by a most ingenious system. The Legislature of 1921 passed an act (Public Laws of 1921, Ch. 38,) authorizing a horizontal reduction in the assessed value of all real estate in the State of North Carolina and providing the machinery for doing so. Among other things this statute provides that:

> "The board of county commissioners and the county board of appraisers and review, heretofore appointed under chapter eighty-four of the Public Laws of one thousand nine hundred and nineteen, (any vacancy which may have occurred to be filled by appointments of the board of county commissioners), shall meet jointly in each county on the first Tuesday after the first Monday in April, one thousand nine hundred and twenty-one, as a county board of review, to determine if the value of

real property as heretofore appraised and assessed in the county as a whole is in excess of the fair value of such property at the time of meeting of such board. The chairman of the board of county commissioners shall be the chairman of the county board of review as thus constituted, and the clerk of the board of county commissioners shall be secretary of the said board. The said board shall make proper inquiry and investigation into the existing values of real property as compared with the assessed and appraised value thereof in the several cities, towns and townships of the county, and if it shall find that the assessed value of such property is in excess of the actual value, it shall find the average precentage of such excess in the county as a whole, or in the several cities, towns and townships, and shall report its findings so made to the State Tax Commission not later than the twentieth day of April, one thousand nine hundred and twenty-one. The values so reported shall be the values at which the property shall be assessed for taxation unless and until the same have been changed and revised by the State Tax Commission and certified to the board of county commissioners of such county, which shall be done not later than the first day of July, one thousand nine hundred and twenty-one." (Sec. 28, (a). Ch. 38, Public Laws of 1921, Appendix, page 62).

This section admittedly has no application to the property of railroad companies and such companies in the event of dissatisfaction with their assessment were required to make application to the Commissioner of Revenue, exercising the authority conferred upon him as successor to the State Tax Commission by Chapter 40, Public Laws of 1921, (appendix, page 66) for a review of the assessment of their property in the same manner as provided in the Machinery Act for complaint by the property owners before the County Boards. (Section 28-g of Machinery Act, Chap. 38, Public Laws, 1921 appendix page

64). There is this material difference in the machinery applicable to the property of railroads and that applicable to real property of other classes of owners:

The County Boards of Review, upon such inquiry and investigation as they desired to make, were authorized by Section 28-a to find the average percentage of assessed value over true value of real property in the county as a whole and to make a horizontal reduction in the assessed values commensurate with their finding. The railroads were required by Section 28-g to establish that the assessed value of their property individually exceeded its true value.

Acting under the provisions of Section 28-a of the Machinery Act, (appendix, page 62) sixty seven counties in the State of North Carolina made horizontal reductions in the assessed value of real estate, varying from 10 per cent to 50 per cent. The reductions in the counties in which the Seaboard operates its lines of railroad are set out in the affidavit of W. L. Stanley and they show an average reduction of 20.73 per cent. (Printed Record, page 57).

Upon application by the complainant to the Commissioner of Revenue for a review of the assessment of its property under Section 28-g (Appendix, page 64) and Section 65 (Appendix, page 65) of the Machinery Act of 1921, and after hearing held on August 16, 1921, the Commissioner of Revenue refused to reduce the assessment of the complainant's property, and upon considering the question of an appeal from such action to the Board of Equalization, complainant found that the statute made no provision for such appeal by a railroad company. It will appear by examination of Section 28-g of the Machinery Act, (Appendix, page 64) and preceding sections and Chapter 40 of the Public Laws of 1921, (Appendix, page 66) that other taxpayers are given the right to appeal to the State Board of Equalization, consisting of the Chairman of the Corporation Commission, the Attorney General and the Commissioner of Revenue, which board is charged with the duty of

supervising the tax levies in the State for the purpose of seeing that property is fairly and equally valued. (Section 28-e of the Machinery Act, appendix, page 63).

The railroad companies were denied the right to have the Board of Equalization pass upon their assessments, and were denied the right to have the action of the Commissioner of Revenue in refusing to reduce their assessments passed upon by any reviewing or equalization board.

In authorizing a horizontal reduction in the assessed value of other property, which could not possibly be based upon the true value of each individual piece of property, and in requiring the railroads to show the decreased value of their property, and in denying the railroads the right to have their assessments equalized with other property by the Board of Equlaziation, the tax laws of North Carolina create a system which of necessity produces a discrimination against railroads, results in a lack of uniformity in taxation guaranteed by Section 3 of Article 5 of the Constitution of North Carolina, and violates the Fourteenth Amendment of the Constitution of the United States.

III

THE TAX LAWS OF NORTH CAROLINA AS ADMINISTERED CREATE AN UNLAWFUL DISCRIMINATION AGAINST COMPLAINANT IN THAT THEY DENY COMPLAINANT EQUALITY AND UNIFORMITY IN THE TAXATION OF ITS PROPERTY.

> "A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge; and yet the officers charged with the administration of that valid tax law may so act under it, in the matter of assessment or collection, as to work an illegal trespass upon the rights of the individual. They may go beyond the powers thereby conferred and when they do so the fact that they are assuming to act

under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts."

Reagan v. Farmers' Loan and Trust Co., 154 U. S., 362.
Raymond v. Chicago Union Traction Co., 207 U. S., 20.

Sixty-seven counties in the State of North Carolina made horizontal reductions in the assessed value of property other than that of railroads varying from 10 per cent to 50 per cent. These reductions applied to every tract of land in the counties without regard to the true value of the land. The tax authorities met, declared that there had been a deflation in the value of land generally throughout the county, and authorized the reduction in the assessment of all real property in the county except that of railroads. Under the revaluation act the true value of this property had been arrived at by taking each individual tract, both within and beyond the borders of incorporated towns, and determining, after an examination of the various factors entering into its value, the true value thereof. We submit that it is perfectly apparent that all the property in a county could not depreciate in a common ratio. City property and county property differ widely in their use and the effect of economic conditions could not be uniform in its application to these properties, and yet in only a few counties was any distinction made in the percentage reduction in the value of city and country property.

In only one of the twenty six counties traversed by the Seaboard was the reduction in the value of town property less than that of country property. Farms, small and large, farm land improved and unimproved, city lots with and without residences, business lots with and without buildings, industrial plants and lands devoted to every character of use were thrown into a common pot and declared to have lost value in exactly the same proportion. The necessary result of this procedure was to reduce the value of property in a large percentage of cases to a figure below the true value and thereby create a discrimination against property assessed at its true value. The

reductions made in the various counties were in every instance approved by the Board of Equalization.

The illogical situation developed by this procedure is demonstrated by the fact that values in Wake County were not reduced while the reductions in the adjoining counties wherein complainant operates its line of railroad and in which the lands differ in no respect from those of Wake County, were as follows: Franklin 40 per cent, Chatham 25 per cent, Durham 25 per cent and Granville 33 1-3 per cent. We submit that no economic condition could so variously affect the values of property under such similar conditions as exist in these counties.

It is said in support of the action of the counties in making horizontal reductions that land had been assessed in 1919 at the flood tide of prices and under unusual conditions. If the high prices were adopted and if the appraisers were influenced by the unusual conditions, it was in direct opposition to the provisions of the Revaluation Act (Public Laws, 1919, Chap. 84), section 5 of which is as follows:

> "In estimating the depreciation of any building, structure, machinery, or other class of property subject to depreciation, the appraisers shall also take into consideration any appreciation by reason of surroundings, increased cost of material and labor, and any other factors which would tend to increase or decrease the value of any such property. In considering the increased cost of material and labor these factors shall be considered upon the basis of such increase as may be deemed to be normal, or stable, and not such temporary increase as obtained during, or immediately on account of, war conditions, and in estimating the real value of land, it shall be with reference to the normal or stable value and not with reference to the temporarily inflated values, but in all cases the appraiser shall determine what is the actual fair market value of the property."

It was certainly the opinion of the State Tax Commission

that the appraisers followed the statute and placed a conservative value on property in making the revaluation. In the report of the commission to Governor Bickett, it is said:

> "There has been some criticism that 'inflated' values have been adopted as the basis of tax values. It is undoubtedly true that we have moved on to a new price level of all commodities since 1915 when real property was last valued. Nevertheless we believe that a careful analysis of the values reported will disclose that there has been a conservative compliance with the provision of the Revaluation Act, that such values should be used as were 'deemed to be stable.'" (Printed Record, page 80.)

Conceding that the reduction in value of other property was justified by economic conditions, was not the property of this complainant and other railroads subject to the same economic law and did not its value similarly decrease from May 1st 1920, to May 1st, 1921?

W. L. Stanley states in his affidavit, (Printed Record, page 58), that the various items of material and equipment necessary in reproducing a railroad decreased in value between May 1st, 1920, and May 1st, 1921, from 21 per cent to 70 per cent, and that the cost of labor which would have been employed in the construction of railway lines decreased 27 per cent between these dates. It is also stated in this affidavit that "the naked value of land for railroad purposes is directly dependent upon the market value of adjacent land and is affected by the same economic conditions. Consequently if such adjacent land has depreciated in value, there must be a corresponding decrease in the value of railroad land."

The facts which sustain the contention of the Seaboard that it is entitled to the same, if not a greater, reduction in its assessed value than other property are set forth in the affidavit of W. L. Stanley, (Printed Record, pages 58, 59 and 60) as follows:

> "The net operating income of the Seaboard Air Line

Railway Company in North Carolina for the calendar year 1918, immediately preceding the assessment of its property as of May 1st, 1919 was $3,112,693.46; for the year 1919, it was $2,412,076.65; for the year 1920, it was $2,534,305.84; for the period of January 1st to April 30th, 1921, it was $704,965.86, or equated upon an annual basis $2,114,897.58. It will, therefore, be observed that the net operating income of the Seaboard in North Carolina has, as compared to the year 1918, decreased by the following percentages:

1919 - 22.5 per cent.
1920 - 18.5 per cent.
1921 - 32.0 per cent. (based upon the first four months thereof.)

As compared to the year 1918, immediately preceding the date of the revaluation of the property of the Seaboard Air Line Railway Company in North Carolina, the net operating income of said railway as a system has decreased as follows:

1919 - 48.9 per cent.
1920 - 123.0 per cent.
1921 - 16.8 per cent. (based upon the first four months thereof.)

"The curtailment in the production of agricultural products and reduction in the output of factories in North Carolina during the year 1921, as compared to the year 1920, which resulted in a deflation of the value of land devoted to agricultural pursuits, as well as a deflation in the value of manufacturing enterprises, and their outputs have materially affected the volume of business handled by this railroad in the State of North Carolina. This is demonstrated by the fact, that for the first four months of the year 1920, it transported to all stations in North Carolina, 1,022,143 tons of freight, both interstate and intrastate; while for the corresponding months of 1921, it transported to such stations, only 692,016 tons of such

freight, or a decrease of 32.3 per cent; during the period, January 1st to April 30th, 1920 said railway forwarded from all stations in North Carolina 962,770 tons of freight, both interstate and intrastate, while for the same period of 1921 it forwarded from such stations 639,699 tons of freight or a decrease of 33.6 per cent; for the first four months of 1920, the Seaboard Air Line Railway Company handled from all stations in North Carolina, 471, 251 passengers, both interstate and intrastate, while for the same period of 1921, it handled from such station only 421,155 passengers, or a decrease of 10.6 per cent; for months subsequent to April 1921, as compared to the same months of the previous year, the decrease has been materially larger, running from 29 per cent in May to 40 per cent in August.

"The number of loaded cars moved over the entire Seaboard System the first six months of 1920 was 927,208 and for the same period of 1921, 686,739, a decrease of 240,469 or 25.93 per cent. The number of loaded-cars moved over the Virginia and North Carolina Divisions, the mileage of which is almost entirely within the State of North Carolina, for the first six months of 1920 was 353,306 and for the same period of the year 1921, 245,901, a decrease of 107,405 or 30.4 per cent.

"When the assessment of the Seaboard Air Line Railway Company's property in North Carolina was made as of May 1st, 1919, and prior thereto, its expenses of operation were materially less than they have been since that date. It therefore follows that the sum of money available for the payment of taxes, interest and finally representing net income was materially greater prior to May 1st, 1919, than it has been subsequent to that date. This is shown by the following statement of the amount of each dollar of gross earnings in North Carolina for the year indicated required to pay operating expenses exclusive of taxes, in that state:

1916 - $ .5549
1917 - .6053
1918 - .6937
1919 - .7570
1920 - .7944
1921 - .7995 (First four months thereof.)

"The business done by the Seaboard Air Line Railway Company in North Carolina is largely interstate, consisting principally of freight that is loaded and discharged in other states, and simply passing through the State of North Carolina in transit. During the years 1919, 1920 and for the first four months of 1921, approximately three-fourths of the total North Carolina earnings were interstate.

"While it is true that the net operating income of said railway in North Carolina by virtue of the foregoing is proportionately larger than in any other state, it is necessary to apply a large percentage of North Carolina's net earnings to the expenses of the operation of the system as a whole and to the reduction of the deficit existing between gross earnings and operating expenses in other states on business originating in or destined to such states and passing through North Carolina."

In another way there has been an illegal discrimination against complainant. Its property is admitted to be assessed at its true value within the meaning of the tax laws of North Carolina. (Printed Record, page 37, at bottom of page). It is demonstrated by the affidavit of C. J. O'Brien, (Printed Record, page 66), based upon affidavits from each of the counties in the State, except Dare and Green Counties, that real property other than that of railroads is now assessed at a figure much less than its true value. The affidavits filed by complainant show that every transfer of land between January 1st, 1921, and June 30th, 1921, in 98 of the 100 counties in the State on record in the offices of the Registers of Deeds, where the consideration was more than $1,000.00, has been examined and

the consideration tabulated and the tax books have been examined and the assessed values tabulated, and the result shows the following totals: Consideration $30,608,475.24; Assessed Value $20,383,684.57. The ratio of assessed to sale value is 66.58 per cent. The fact that every deed has been examined over a period of six months and the result tabulated, without any method of selection, distinguishes this case from those in which only a few isolated instances of undervaluation were shown.

The affidavit of George M. Phifer, (Printed Record, page 64), showing the sale value and assessed of property in Mecklenburg County is typical of the affidavits of other counties. It appears from this affidavit that property of the assessed value of $1,815,279.50 was transferred by deeds showing a total consideration of $3,169,115.25, a ratio of 57.28 per cent.

That the amount of consideration in recent sales is an important element in determining the true value of the land will appear from the affidavit of the former State Tax Commission under the supervision of which the revaluation act was made effective. (Printed Record, page71.) This affidavit was filed by defendants.

This undervaluation, of which complaint is made, is sytematic because it is made under a statute which creates a system and because it is the result of a horizontal reduction in the value of all real property, except that of railroads. It is intentional because it is the logical result of the method adopted in reducing values. It is illegal because it creates an arbitrary and oppressive discrimination against complainant and other railroads.

IV

THE COLLECTION OF TAXES BASED UPON AN ASSESSMENT WHICH DENIES A TAXPAYER EQUALITY AND UNIFORMITY IN TAXATION WILL BE ENJOINED.

The Constitution of North Carolina provides that:

"Laws shall be passed, taxing by a uniform rule, all

moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property, according to its true value in money." Article 5, Sec. 3.

"All taxes levied by any county, city, town or township, shall be uniform and ad valorem and upon all property in the same except property exempted by this Article." Article 7, Sec. 9.

In Cummings v. Bank, 101 U. S., 153, it is said:

"Uniformity in taxing implies equality in the burden of taxation and this equality of burden cannot exist without equality in the mode of assessment as well."

Is there equality in the mode of assessment of complainant's property and that of other taxpayers in the State of North Carolina? Manifestly there is not, and it is of this inequality that complaint is made, and we submit that the facts fully sustain our position that this case presents an "extreme inequality in taxation of which the Federal Courts should lay hold."

Dane v. Jackson, 41 Sup. Ct., Reporter 566.

The provisions of the tax laws and the universal undervaluation of other property and the admitted assessment of the property of complainant at its true value as defined by the tax laws of North Carolina are sufficient to meet the requirements of every decision of the United States Supreme Court in which the question of discrimination by inequality of assessment has been presented. The expressions by which the rule is stated in these cases must be considered in connection with the facts, and, when so considered, it will, we confidently submit, be found that there is no decision of this court which will sustain the denial of relief to complainant upon the facts of this case.

In one of the first cases to come before the Supreme Court involving this question, the principle upon which a court of

equity will grant relief from a discrimination in assessment of property for taxation is fully stated as follows:

> "When a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when the rule is applied not solely to one individual but to a large class of individuals or corporations, equity may properly interfere to restrain the operation of this unconstitutional exercise of power."
>
> Cummings v. Bank, 101 U. S., 153, quoted with approval in Raymond v. Trust Co., 207 U. S., 20; Greene v. L. & I. R. R. Co., 244 U. S., 499.

We do not find that the effect of the provisions of the Consitution of North Carolina, quoted above, upon a discrimination in assessment for taxation has been determined by the Supreme Court of North Carollina. Similar provisions will be found in the constitutions of other states in which it has been held that railroad property cannot be assessed at a higher percentage of its value than other property.

> Ex parte Bridge Co., 62 Ark., 461;
> C. B. & Q. R. Co. v. Board of Equalizers, 67 Fed., 411;
> Trustees of Railroad v. Guenther, 19 Fed., 395.

In *Porter v. Langley, (Texas)* 155 S. W., 1043, the evidence showed that the value of land in Hill County was from $90. to $125. an acre and was assessed at $40. per acre and bank stock assessed at 100 per cent of its value, and the court held the assessment of the bank stock to be a clear discrimination against the owners of bank stock and to deny to them the right of equal and uniform taxation secured by the constitution of the state.

When the constitution of the state requires uniformity and equality in taxation, such principles cannot be denied a large class of citizens of the State without violating the provisions

of the Fourteenth Amendment, and whether the denial is the result of the state law itself or its administration, the result is the same.

County of San Mateo v. Railroad, 13 Fed., 722;
County of Santa Clara v. Railroad, 18 Fed., 835.

It has been frequently held by the United States Supreme Court that the protection of the Fourteenth Amendment can be invoked where unequal taxation is the result of the administration of a good law as well as when it results from the operation of a bad law.

Reagan v. Far. L. & T. Co., 154 U. S., 362;
Cummings v. Nat. Bank, 101 U. S., 143;
Pelton v. Nat. Bank, 101 U. S., 143;
Dundee M. & T. Co. v. School Dist. 21 Fed., Rep., 151.

In *C. M. & St. P. Ry. Co. v. Kendall et al.*, 278 Federal, 298, it was recently held:

"Code Iowa 1897, Sec. 1336, and Code Supp. Iowa 1913, Sec. 1305, requiring all property, with certain exceptions, to be valued for taxation at its actual value prohibits inequality of treatment, and intentional, deliberate assessment of different classes of property at different percentages of the actual value constitutes unlawful discrimination, forbidden by the law, and hence by the federal Constitution.

As the intentional deliberate assessment of different classes of property at different percentages of actual value contrary to Code Iowa 1897 Sec. 1336 and Code Supp. Iowa 1913, S. 1305, is contrary to the national Constitution, it may be enjoined by a federal court."

The case of *Raymond v. Chicago Union Traction Co.*, 207 U. S., 20, seems to us to establish the right of complainant to relief in this case. It is there held that:

"Assessing the franchises and other property of certain

corporations at a different rate and by a different method from that employed for other corporations of the same class for the same year, which results in enormous disparity and discrimination, denies the due process of law and equal protection of the laws protected by United States Constitution, 14th Amendment, against impairment by the State."

While in the case from which we quote, a different method for the assessment of the property of corporations of the same class was found to exist, the discrimination between corporations of the same class is not made an essential fact in establishing a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. This is made plain by the case of *Nashville, etc., R. Co. v. Taylor*, 86 Fed., 168, and the following quotation from *Louisville Trust Co. v. Stone*, 107 Fed., 305, which appears in the opinion of Mr. Justice Peckham:

> "It may be conceded that, if the allegations of the bill are made out, there exists, in respect to the property of complainant and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by the taxing officers of the state, which necessarily effects an unjust discrimination against the property of which the plaintiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and that in such cases Federal jurisdiction will arise because of the equal protection of the laws guaranteed by the 14th Amendment."

In the Taylor case, (86 Fed., 168) cited by Mr. Justice Peckham in *Raymond v. Chicago Union Traction Co., supra*, it is held:

> "While it may be true that the proposition that a tax statute, or a tax laid under a statute, is in violation of the constitution of the state, is not of itself sufficient to

constitute a violation of the Fourteenth Amendment, yet when, in addition, the statute results in an *arbitrary and oppressive discrimination in regard to a large class of citizens, or a large species of property, it is such class legislation, and such denial of the equal protection of the laws, as renders it obnoxious to the Fourteenth Amendment.*" (Italics added)

The complainant in the Taylor case brought suit to enjoin certification by the State Board of Equalizers of Tennessee of assessed value of complainant's property upon the ground that under the laws applicable to railroad and telephone property it had been deprived of the constitutional right of equalization provided for and allowed in respect to all other property in the state subject to taxation, and in consequence its property had been assessed at 25 to 40 per cent more in proportion to value than other classes of property. The question of jurisdiction of the Federal Court upon this state of facts is elaborately discussed by District Judge Clark and the jurisdiction upheld. Judge Clark meets the objection that the Fourteenth Amendment is directed solely against state action and therefore not applicable to the facts presented in this language:

"It was said in the discussion at the bar that the prohibitions of the Fourteenth Amendment are directed against state action only, and the correctness of this proposition is fully conceded, but a too limited definition and a too narrow view of what constitutes state action must not be entertained. State action to which the prohibitions of the Fourteenth Amendment extend is not limited to a legislative enactment as it comes from the hands of the Legislature, but extends to all instrumentalities and agencies officially employed in the execution of the law down to the point where the personal and property rights of the citizen are touched." (86 Fed., at page 183).

This case was taken by appeal to the Circuit Court of Appeals, Sixth Circuit, and heard by Circuit Judges Taft and

Lurton and District Judge Severens. (88 Fed., 350). The order of the District Court in granting the injunction was affirmed in an opinion by Circuit Judge Taft. After the decision of the Circuit Court of Appeals, the defendant applied to the United States Supreme Court for a writ of certiorari and the motion was denied. (172 U. S., 647).

In *National Bank v. Kimball*, 103 U. S., 732, 735, Mr. Justice Miller, referring to the rule that equity will not interfere with an excessive assessment, says:

> "An apparent exception to the universalty of the rule is admitted in *People v. Weaver*, 100 U. S., 539, *Pelton v National Bank*, 101 U. S., 143 and *Cummings v. National Bank*, 101 U. S., 153. It is held in these cases that when the inquality in valuation is *the result of a statute of the state designed to discriminate injuriously* against any class of persons or any species of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments *combine together and establish a rule or principle of valuation*, the necessary result of which is to tax one species of property higher than others, higher than the average rate, the court will also give relief." (Italics added)

Independently of the statute, when a system of valuation is adopted by assessors which is designed to operate *unequally*, and does operate unequally when applied not solely to an individual, but to a large class of individuals, or corporations, the case is a proper one for a court of equity to correct.

> Cummings v. National Bank, 101 U. S., 153;
> Stanley v. Supervisors, 121 U. S., 535;
> Pelton v. National Bank, 100 U. S., 143;
> Boyer v. Boyer, 113 U. S., 689.

In *Trustees v. Guenther*, 19 Fed., 395, it appeared that the court took judicial notice of the fact that property in

general in the State of Tennessee was assessed at about seventy-five percent of its value. The railroad's property was assesed at more than its value. It also appeared that the assessors intended to assess lands below their value and to assess railroads at their full value. In holding that "intentional inequality" entitled the plaintiff to relief, Judge Key says:

> "Mere inequalities in taxation will not vitiate a tax if they be accidental and unitentional. * * * * There will, of necessity be many instances in which property will be assessed at more than its value, and more, perhaps, in which it will be assessed at less than its value. These errors and discrepancies will not vitiate the tax; they are inevitable. But a different result follows should a standard of valuation be used for one species of property, which is different from that used for another, if the end reached necessarily is the taxation of the one species higher than the other." (p. 398).

The court valued the property, and assessed it at an amount considered to be fair, "as compared with the rate at which other property was valued for taxation," and enjoined the collection of the excess.

In *Dundee Mortgage Trust Co. v. Parrish*, 24 Fed., 197, it was contended that it did not appear that the low assessment of property in general was designedly made or made by preconcert. Answering this contention the Court says:

> "It is not necessary that there should be any actual conspiracy, or expressed design, to disregard the law in this respect, on the part of the assessor, to render the assessment illegal. Whenever the assessor of a district or a county, as large as one of these counties, uniformly estimates real property at only one-third of the value he places on mortgages, it is impossible to attribute the result to the infirmity of human judgment, and the only conclusion possible in the premises is, that it was de-

liberately and wilfully done in pursuance of a settled purpose or rule on his part; and where the same thing occurs in a number of counties in various parts of the State, it is manifest that the action of the assessors is not only wilful and deliberate, but that it is the result of a general and well understood custom to substitute this conventional value of real property for the 'true cash' one which the statute requires."

In *Taylor v. Louisville & Nashville R. Co.*, 88 Fed., 350: it is held:

"Equity will not enjoin an assessment of property at its full value, on the ground of inequality resulting from the assessment of other property at less than its full value, unless it appears that the assessing officers, whose acts of undervaluation create the unjust burden intentionally and habitually violate the law by assessing property at less than its true value; *but it need not affirmatively appear that they did so with intent to injure complainant and his class of taxpayers.*" (Italics aded).

In *Bureau County v. C. B. & Q. R. Co.*, 44 Ill., 229, it is held:

"When the property belonging to individuals in a county has been assessed at less than its actual value, the constitutional rule of uniformity forbids that the property of a railroad, in such county, should be assessed upon any greater percent of its value than that of individuals."

The text books are in accord with the cases cited herein:

"Injunction may issue where it is shown that there was an illegal discrimination against particular classes of property, in making the valuation, resulting from the intentional and systematic adoption of a rule or principle of valuation contrary to the constitutional or statutory requirement of equality and uniformity."

37 Cyc., 1264, citing cases from the United States Supreme Court and from the courts of Kansas, Oregon, Pennsylvania, Washington and Wisconsin.

> "While excessive assessments should be corrected by the course provided by law for such correction, yet where over-valuation has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory provision, a party may have a preventive remedy by resorting to equity to enjoin the collection of the excess upon payment or tender of the amount due upon a just valuation."
>
> Spelling on Extraordinary Remedies, Sec. 649;
> Elliott on Railroads, (2nd Ed.) Sec. 751 b.

Many of the questions presented in this case arose in a case decided in the Fourth Circuit, *Southern Railway Company, and others, v. North Carolina Corporation Commission,* 104 Fed., 700, and for convenient reference we will quote a large part of the opinion of Simonton, Circuit Judge:

> "The standing master has submitted to the court certain questions which have arisen in the course of his examination. The complainants, in their testimony in chief, produced evidence as to the taxes assessed on property in the county of New Hanover for the year 1898, having up for this purpose the register of deeds. In the course of this examination they sought to prove the true value of the property of certain corporations, probably for the purpose of comparison with the assessed value for taxation of these corporations. To this end they issued subpoenas duces tecum, and required the production of the books of such corporations, and their examination. Two questions arise: First, as to the competency and relevancy of an examination into the assessment for taxation of various parcels of property. Second, as to the right of complainants to demand the production of the books of these private corporations, and the

examination of them. The discussion and decision of this last question has been postponed at the request of counsel on both sides.

As to the first question: Counsel for defendants earnestly protest against the method of examination. They say, if separate items of property are examined in order to discover if the assessment of each is or is not its true value in money, the examination will be protracted in infinitum. The complainants allege that there is an established rule in North Carolina whereby all real and personal property other than railroad property is assessed for taxation below its actual value in money, and so the action of the corporation commission in assessing railroad property at its actual value in money creates a discrimination which is unlawful. If this alleged rule existed in resolution of the various boards of assessors, or in any compact between them, oral or written, or in any statutory enactment, the proper mode of proving it would be by evidence directly showing the existence of such rule. *If, however, the existence of the rule cannot be shown in this way, but is a matter of inference from a uniform course of conduct, then the only mode of proof is by showing a sufficient number of instances from which such a course of conduct could be inferred.* In the one case the conclusion would be reached *a priori;* in the other *a posteriori.* In the one case we would go from the general to the particular; in the other from the particular to the general. If, therefore, the complainants cannot establish the existence of the rule except by inference, it is lawful for them to introduce evidence as to the particular instances from which they seek to establish the general rule. During the examination the defendants propounded questions tending to show the value of the roadbed and other property of the corporations complaining of the action of the corporation commission. Complainants object

to this line of examination on the ground that the matter is not in this issue. The constitution of the State of North Carolina and the acts of assembly passed under the authority thereof require all real and personal property in the state to be assessed for taxation at its actual value in money. The corporation commission, which is intrusted with the assessment of railroad property for taxation, assessed the property of the several complainants at a certain sum each. The complainants thereupon come into this court, alleging that the method adopted with regard to them differs materially from the method adopted with regard to all other real and personal property in the state, so that they are exposed to unjust discrimination. On that allegation they ask an injunction. On the truth of that allegation depends the action of this court. It cannot assess the value of property, nor perform any of the functions of the assessor. It cannot pass upon the assessment, and say whether or not it be excessive, or whether it be illegal, irregularly imposed, or unjust. *Railroad Tax Cases,* 92 U. S., 575. There must be some ground for the interference of a court of equity And its interference cannot go to the reassessment of the property, but to the removal of the unlawful action. In the present case we must assume that the commission did its duty and fulfilled the constitutional and statutory requirement in assessing the railroad property. The amount of the assessment this court cannot question. *The sole question is, does there exist in North Carolina a rule or practice universal enough to presume the existence of a rule whereby all real and personal property other than railroad property is assessed below its value for taxation?* The burden of showing this in on complainants. Until this burden is removed, the inquiry must be directed to it. If it be removed, then it may possibly be competent for the defendants to show that, if such a rule or practice does

exist, it is applied also to the railroad companies, and as to them there is no discrimination. The standing master will conduct the examination in accordance with these rulings." (Italics added).

If the complainant has been denied equality and uniformity in the assessment of its property for taxation, as we contend, then there can be no doubt about the jurisdiction of an equity court to grant relief since the decision of the United States Supreme Court in *L. & N. R. R. Co. v. Greene*, 244 U. S., 522.

We recognize that if it should be assumed that the assessment in this case is invalid, equity will not restrain the collection of taxes unless there is some other ground to support the equity jurisdiction.

Raymond v. Chicago Union Traction Co., 207 U. S., 20 and cases cited at page 39.

We, therefore, submit that the interposition of equity is fully justified upon the following grounds:

First: The assessment creates a cloud upon complainant's title.

Second: Complainant has no adequate remedy at law.

Third: If the taxes are paid to the state, county, municipal and other officers, it will lead to a multiplicity of suits.

Fourth: Complainant will suffer irreparable injury.

Either of these grounds, together with the invalidity of the assessment, will support the equity jurisdiction.

Insurance Co. v. Bailey, 13 Wall., 616, 623;
Spelling on Extraordinary Remedies, Sec. 642.

I. THE ASSESSMENT CASTS A CLOUD UPON COMPLAINANT'S TITLE.

By the Machinery Act of 1921, (Sec. 98 of Chap. 38 Public Laws of 1921, appendix page 66) the taxes upon all property of the complainant are made a perpetual lien upon such

property and any part thereof may be taken and held for payment of all taxes assessed against complainant.

This in itself casts a cloud upon complainant's title.

The illegality of the tax, coupled with the fact that it may result in a cloud being cast upon complainant's title, presents a clear case for equitable interference.

Spelling on Extraordinary Remedies, Sec. 665.

It is well settled that a tax assessment apparently valid on its face, yet illegal or void, is such an incumbrance or charge as will constitute a cloud on title, which a court of equity will interfere to prevent or remove.

Pom. Eq. Jur., (3rd Ed.) Sec. 1345;
Un. Pac. Ry. v. Cheyenne, 113 U. S., 525;
Lyon v. Alley, 130 U. S., 177, 187;
Gage .v Kaufman, 133 U. S., 471;
Cooley on Taxation, 780.

Where a tax act specifically makes the tax a lien upon the real estate of the tax payer, equity has jurisdiction of an action seeking to remove the cloud upon the title thus created.

Ohio River & W. R. Co. v. Dittey, 232 U. S., 576.

2. COMPLAINANT HAS NO ADEQUATE REMEDY AT LAW

It is a guiding rule in the Courts of the United States that a bill in equity does not lie in any case where a *plain, adequate and complete remedy* may be had at law.

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481.

This leads to a consideration of the character of remedy at law open to the complainant in this case. The following statutes relating to the remedy for unlawful taxation were in force in this state, when this action was brought:

"No injunction may be granted by any court or judge to restrain the collection of any tax or any part thereof, or to restrain the sale of any property for the nonpayment

of any tax, unless such tax or the part thereof enjoined is levied or assessed for an illegal or unauthorized purpose or the tax asessment is illegal or invalid." Consolidated Statutes, Sec. 858.

"Unless a tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part, nor to restrain the sale of any property for nonpayment thereof; nor shall any court issue any order in claim and delivery proceedings or otherwise for the taking of any personalty levied on by the sheriff to enforce payment of such tax or assessment against the owner thereof. Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff; but, if, at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state or of the county, city or town, for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such county, city or town for the amount so demanded, including in his action against the county both state and county tax; and if upon trial it shall be determined that such tax or any part thereof was levied for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest and the same shall be collected as in other cases. The amount of state taxes for which judgment shall be rendered in such action shall be refunded by the state treasurer." Consolidated Statutes, Sec. 7979.

In Sherrod v. Dawson, 154 N. C., 525, this statute is construed to give the tax payer the option of asking for an injunction or paying under protest and suing to recover back the taxes paid.

If the remedy at law is open to the complainant, it is not such remedy as will defeat the complainant's right to the relief afforded by equity.

The remedy at law, in order to exclude equity, must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.

Tyler v. Savage, 143 U. S., 79.

The remedy at law must be adequate, as will not be the case where the person illegally taxed would suffer irremediable damage, or be subjected to vexatious litigation, if compelled to resort to his legal remedy alone.

Odgen City v. Armstrong, 168 U. S., 224;
Shelton v. Platt, 139 U. S., 591;
Union Pac. R. Co. v. Cheyenne, 113 U. S., 516;
Lyon v. Alley, 130 U. S., 177, 187.

Remedy at law must be prompt and certain.

Wells, Fargo & Co. v. Johnson, 214 F., 180, 189.

An injunction will be granted to prevent the levying of a tax, the payment of which will subject the plaintiff to the hazard of a number of suits from other parties, under the doctrine of the prevention of a multiplicity of suits.

Foster's Fed. Prac., Vol 1, Sec. 209;
Cummings v. Nat. Bank, 101 U. S., 153, 157;
Pelton v. Nat. Bank, 101 U. S., 143, 148;
Hills v. Exchange Bank, 105 U. S., 319, 332;
Assessors v. Pullman Co., 60 Fed. Rep., 37.

In *Elliot on Railroads,* Vol. 2, Sec. 751, (2nd Ed.) it is said:

"We believe the true rule to be that where the tax sought

to be enforced is illegal and void, its enforcement will be restrained by injunction, except in case where an adequate remedy is provided by statute. The rule we have stated is, as we believe, supported by sound principle, and is well fortified by authority. We can see no reason for holding that the enforcement of an illegal tax may not be enjoined, although it may be void.

Even a void proceeding may cloud title and do an injury to a property holder, and there is no remedy except that of injunction, which will effectively prevent or redress the injury. It seems to me where the entire controversy can be settled by the comprehensive equity remedy, and all complications prevented, the remedy should be applied, rather than drive the taxpayer to an action for damages. There is certainly no objection to the employment of the equitable remedy, except that which grows out of the old doctrine, established when the strife between courts of law and courts of equity was bitter, and, as that doctrine is now of comparatively little practical importance, there is reason for extending, as the courts are now doing, the remedy of injunction. We think it wiser to restrain by injunction than to compel an action against the officer whose duty it is to collect the tax."

In a case similar to this, involving a Tennessee statute it was held:

"Equity will interfere to enjoin the collection of an illegal tax upon railroad property, where it appears that, if the tax is paid, it will require some forty suits to recover back the money, and the Federal Court will apply the remedy, notwithstanding a State statute, passed since the company was chartered, prohibits injunctions against the collection of taxes."

L. & N. R. R. Co. v. Gaines, 3 Fed. Rep., 266, 282.

In the case of *In re Tyler*, 149 U. S., 164, 189, the pay-under-protest statute of South Carolina was claimed to be an insuper-

able obstacle to equity jurisdiction, but Chief Justice Fuller denied the contention in the following language:

> "Manifestly the object of this legislation was to confine the remedy of the tax-payer for illegal assessment and taxation to the payment of taxes under protest, and bringing suit against the county treasurer for recovery back, *but all this is nothing to the purpose. The legislature of a state cannot determine the jurisdiction of the courts of the United States,* and the action of such courts in according a remedy denied to the courts of a state does not involve the question of power." (Italics added).

To the same effect are:

> Cummings v. Merchants Nat. Bank, 101 U. S., 153;
> Allen v. B. & O. R. R. Co., 114 U. S., 311;
> Hagood v. Southern, 117 U. S., 71;
> In re Ayers, 123 U. S., 500;
> McGahey v. Virginia, 135 U. S., 676.

Even if these state pay-under-protest statutes were applicable they do not afford a complete remedy to a company which may be subjected to a multiplicity of suits and whose public duties may be seriously interfered with by the seizure of its property.

> Southern Ry. Co. v. Asheville, 69 Fed., 360, 361;
> Lindsay v. Bank, 156 U. S., 485, 494.

It may be contended by defendants that the following statute, enacted since the commencement of this action gives an adequate remedy against the state for the recovery of the franchise tax:

> "Whenever taxes of any kind are or have been through clerical error, or misinterpretation of the law, or otherwise, collected and paid into the State Treasury in excess of the amount legally due the State, the State Auditor shall issue his warrant for the amount so illegally collected, to the person entitled thereto, upon certificate of the head of

the department through which said taxes were collected or his successor in the performance of the functions of that department, with the approval of the Attorney-General, and the Treasurer shall pay the same out of any funds in the treasury not otherwise appropriated: PROVIDED, demand is made for the correction of such error or errors within two years from the time of such payment: PROVIDED FURTHER, that claims which have arisen within the five years next preceding the ratification of this act shall be presented and made within two years from the ratification of this act." (Chap. 96, Public Laws, Extra Session, 1921).

This statute does not affect the right of complainant to an injunction in this case because (1) it was enacted after suit brought, (2) it does not require the head of the department to act, (3) the State Supreme Court approved the granting of an injunction in a tax suit after its enactment (*Long v. Watts*, 110 S. E., 765.)

A state cannot by statute limit the equity jurisdiction so as to bind the courts of the United States.

Pittsburg, etc. Ry. v. Board of Pub. Wks., 172 U. S., 32;
In re Tyler, 149 U. S., 164.

Right to enjoin illegal taxation upon some recognized equitable ground, such as cloud upon title to real estate, is not barred by the existence of special statutory remedy.

Gregg v. Sanford, 65 Fed., 151;
Bank v. Mylin, 76 Fed., 385;
Taylor v. L. & N. R. R., 88 Fed., 350.

3. IF COMPLAINANT IS REQUIRED TO PAY ITS TAXES UNDER PROTEST AND SUE TO RECOVER BACK THIS WILL LEAD TO A MULTIPLICITY OF SUITS.

The following discussion is for the purpose of showing that in addition to the other grounds of equitable jurisdiction, there

exist facts which justify the interposition of equity to prevent a multiplicity of suits, and, in addition it will emphasize the inadequacy of the remedy, if any exists at law.

> "If the assessments complained of be illegal for any reason, the jurisdiction of a court of equity to enjoin the defendants from certifying them to the several county auditors of the state seems to be clear, upon the ground that a multiplicity of suits would result unless the assessment be enjoined before the assessors shall certify to each county auditor the proportion of the gross assessments collectible by each county auditor under the scheme of apportionment among the counties provided by the act. To require the complainants to pay to each of the numerous county auditors, and then sue to recover, or to enjoin each, would be most oppressive. We think, therefore, that the jurisdiction asserted in the bill, of avoiding a multiplicity of suits, was a sufficient ground to support the original bill subsequently filed to enjoin the tax of 1894, assessed after the jurisdiction of the original case had been attached."
>
> Sanford v. Poe, 69 Fed. 546.

In *Pomeroy's Equity Jurisprudence* (3rd Ed.) p. 418 it is said:

> "By the practice in many of the states, taxes on railroad companies, telegraph companies and the like are assessed by a state board on all the property of the company within the state, and proportionate parts of these taxes are certifed for collection to the tax officials of the various counties in which the company operates. An illegality in the assessment by the state board may thus expose the company to separate suits in many counties, and has frequently been the subject of an injunction on the ground of preventing a multiplicity of suits."

In *Western Union Telegraph Co. v. Norman,* 77 Fed. Rep.,

13, it is held that the equity jurisdiction of the Federal Courts in the case of a bill by a telegraph company to enjoin a state auditor from certifying to the various county clerks the proportions of an alleged illegal tax to be collected in their several counties, is sustainable on the ground of preventing a multiplicity of suits, and because of irreparable injury.

In holding that injunction is the proper form of relief from an assessment for taxation upon unconstitutional principles, Mr. Justice Holmes, in *Fargo v. Hart,* 193 U. S., 490 says: "It avoids the necessity of suits against the officers of the counties of the state, and we are of opinion that the bill can be maintained."

In *Pyle v. Breneman,* 122 Fed., 787, the plaintiff in pursuit of his legal remedy would have been compelled to sue a number of different municipalities among whom the tax collected would have been distributed, and it was held by the Circuit Court of Appeals for the Fourth Circuit, in an opinion by District Judge Boyd, that the remedy at law was inadequate and the jurisdiction of equity to interfere by injunction was sustained.

The averments of the bill of complaint relating to multiplicity of suits and the inadequacy of the remedy at law in the present case are very similar to the averments contained in the bill filed in *Raymond v. Chicago Union Tractor Co.,* 207 U. S., 20, in which the court says:

> "In the case at bar it is averred that it is the duty of the collector, having received the money on his warrant, to pay the sum so received in the proportions designated in his tax books to the city treasurer of the city of Chicago, the county treasurer of the county of Cook, the treasurer of the sanitary district, and other officers and authorities entitled to receive the same, and if the plaintiff instituted suit to recover back the taxes so paid to the town or county collector he would be obliged to bring separate suits against each one of the several taxing bodies receiving its proportionate share of the tax, thereby necessitating a multiplicity of suits, and the proportion of tax which would go

to the State of Illinois could not be collected back by any legal proceeding whatsoever; and if repayment could be compelled from the city of Chicago and other taxing bodies, such repayment would not cover the cost, including commissions deducted for the collection of the tax and in that way it was averred that the appellee would be subjected to great and irreparable injury, for which there was not a complete or adequate remedy at law. There was also the allegation, already referred to in the foregoing statement, that, if compelled to pay this enormous tax, it would be rendered insolvent. We think all these allegations combine to take the case out of the class where relief is prayed for, founded simply upon the unconstitutionality of the law under which the tax is levied, or upon the illegality, for any other reason, of the tax itself and bring the case within the jurisdiction of a court of equity."

It will appear from an examination of the bill of complaint that complainant will be required to bring suit against more than ninety tax officials in twenty six different counties, if it should be held that injunction is not a proper remedy.

4. COMPLAINANT WILL SUFFER IRREPARABLE DAMAGE.

There are two very material ways in which the complainant will suffer irreparable damage if the action of the defendants is not restrained and complainant is required to pay under protest and sue to recover back the amount paid.

First, complainant's road runs through twenty-six counties, seventy-three incorporated towns and numerous special tax districts. Each of these governmental subdivisions must be sued in order to recover back the tax paid. This would make necessary the expenditure of a large sum of money to meet the expense of this litigation, and complainant would have no means of securing reimbursement.

Second, no provision is made by statute for payment of

state taxes to the State Treasurer under protest and recovery back. Authority of the legislature is necessary to suit against the state. Complainant would, therefore, be without remedy at law so far as the taxes paid the state are concerned.

Raymond v. Chicago Union Trust Co., 207 U. S., 20.
Pyle v. Brenneman, 122 Fed. 787.

V.

THE FRANCHISE TAX IS UNCONSTITUTIONAL AND VOID

The Revenue Act of 1921, Section 82 (6½) provides that:

"Every railroad company doing business in this State shall annually on or before the thirtieth day of July make and return to the State Tax Commission, in such form and upon such blanks as shall be furnished by the State Tax Commision, and giving such information as the State Tax Commission shall require for the purpose of carrying out the provisions of this section, and upon which report the State Tax Commission shall ascertain and certify to the State Auditor the value upon which the amount of taxes which shall be paid by any such railroad company as a franchise or privilege tax shall be calculated. The basis upon which such calculation shall be made by the State Tax Commission and the extent to which every such railroad company is exercising its franchise in this State shall be found to be the value of the property, tangible and intangible, of each such railroad company in the State assessed for the year in which such report is made for ad valorem taxes. The franchise tax of each such railroad company for the privilege of exercising its franchise in this State shall be one-tenth of one per cent (0.1per cent) of the value so ascertained by the State Tax Commission, and such tax shall be due and payable on or before the fifteenth day of October in each year. If any such company shall fail to make the report provided for, it shall

be the duty of the State Tax Commission to make an approximation from the reports and records on file in that department of the amount of taxes due under this section, and certify same to the State Auditor and Treasurer for collection. No county, city or town shall be allowed to collect any taxes under this section."

This section attempts to impose on the plaintiff, Seaboard Air Line Railway Company a so-called franchise tax of $34,768.44, being one tenth of one per cent of the value "ascertained by the State Tax Commission" of $34.768.44.00.

We submit that this section of the statute violates the Constitution of the United States and the Constitution of North Carolina in that:

First: It is not a franchise tax, but an ad valorem tax and is not levied on other property.

"Neither state courts nor legislatures by giving a tax a particular name or by the use of some form of words can take away our duty to consider its nature and effect."

GH & SA R. Co. v. Texas, 210 U. S., 217;
St. L. & S. W. R. Co., v. Arkansas, 235 U. S., 350.

Burroughs on Taxation, p. 169, says that one of the elements by which a franchise tax is distinguished from a property tax is that "a property tax is imposed upon a valuation which is the basis of the computation. It is assessed by the assessors where it is situated or at the residence of the owner and is collected by the collector of the district; while the franchise tax is imposed directly by the legislature, is not assessed by the assessors and *the amount depends upon the amount of business transacted by the corporation, and the extent to which they have exercised the privileges granted in their charter, without reference to the value of their property or the nature of the investments made in it.*"

The tax imposed by Section 82 (6½) has none of the elements of a franchise tax, other than the name given it by the legislature.

The basis of its calculation bears no relation to the business of the railroad companies on which it is imposed, nor to the extent of the exercise of their charters. It is a percentage of the assessed value of the property of the railroads, and is in no way distinguishable from any other property tax. If this is a property tax its invalidity is apparent because it is imposed only on railroads and certain other corporations and violates the uniformity provision of the Constitution of North Carolina and the Fourteenth Amendment of the Constitution of the United States.

The distinction between an excise tax and a property tax is laid down in Ruling Case Law, Vol. 26, page 35, as follows:

> "An excise and a property tax, when the two approach each other, ordinarily may be distinguished by the respective methods adopted of laying them and fixing their amounts. If a tax is imposed directly by the legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise; but if the tax is computed upon a valuation of property, and assessed by assessors either where it is situated or at the owner's domicile, although privileges may be included in the valuation, it is considered a property tax."

Provident Institution v. Massachusetts, 6 Wall., 611;
Pingree v. Auditor General, 120, Mich., 95;
State v. Stonewall Insurance Co., 89 Ala., 335.

Second. It is levied on an erroneous assessment.

This position is of course dependent upon the disposition made of our contention that the assessed value of complainant's property is too high.

Third. It is a burden on interstate commerce.

If this is a franchise tax, and not a property tax, it is void

as a burden on interstate commerce. In assessing the property of a railroad company for the purpose of ad valorem taxation the statutes of North Carolina require that there shall be added to the tangible value the franchise value and such franchise value is arrived at by a consideration of the gross earnings as compared with the operating expenses and particularly by consideration of the value placed upon the whole property by the public as evidenced by the market value of all capital stock and securities. Thus the value arising from the right to engage in interstate commerce is taxed as property. (See Section 64, Machinery Act. Appendix, page 64).

This method of assessment is permissible under the decisions of this court. But the State will not be permitted to add to the burden of a railroad company another tax "for the privilege of exercising its franchise in this State." Such tax is, we submit, manifestly a tax on interstate commerce and a burden thereon within the rules stated in repeated decisions of this Court.

> "Consistently with the commerce clause of the Federal Constitution, the State could not tax the privilege or act of engaging in interstate commerce, but could tax the company's property within the State, although chiefly employed in such commerce."
>
> Wells Fargo v. Nevada, 248 U. S., 165;
> G. H. & S. A. R. Co., v. Texas, 210 U. S., 217.

In *Kansas City Railway v. Kansas,* 240 U. S., 227, at page 23, the court says:

> "It must be assumed in accordance with repeated decisions, that the State, cannot lay a tax on interstate commerce in any form, by imposing it either upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts as such derived from it."
>
> Postal Telegraph & Cable Co. v. Adams, 155 U. S., 688.

The defendants recognize the force of our contention that this statute imposes a burden on interstate commerce and at-

tempt to avoid it by taking the position that the tax imposed by the statute is "a privilege or franchise tax imposed upon all railroads, domestic and foreign, for the privilege of exercising their franchises in the State of North Carolina, that is, for the privilege of engaging in strictly intrastate commerce within the said State." (See Sec. 10 of answer Printed Record, page 45).

There has been no construction of the language of section 82 (6½) by the Supreme Court of North Carolina limiting it to intrastate commerce as was the case in *St. Louis Southwestern Ry. Co., v. Arkansas,* 235 U. S. 350, relied upon by defendants in the lower court. We submit that in the absence of such construction by the State Court, this Court will look to the language used and if it is broad enough to include interstate commerce, it will be held to fall within the condemnation of numerous decisions of this court as a burden upon such commerce.

It must clearly appear that only intrastate business is taxed before the statute can be upheld.

> Judson on Taxation (Second Edition.) Sec. 232, citing.
> Webster v. Bell, 68 Fed., 183;
> Express Co. v. Allen, 39 Fed., 712;
> Postal Co. v. Richmond 99 Va., 102 ;
> Oklahoma v. Wells, Fargo & Co., 223 U. S., 97, and Barrett v. New York, 232 U. S., 14.

This statute taxes the railroad company's "privilege of exercising its franchise in this State," both with respect to interstate and intrastate business, and the basis of the assessment upon which the tax is levied includes the value of the property as an interstate as well as intrastate carrier. Manifestly, its language does not clearly limit its application to the privilege of engaging in intrastate business.

Our position that this so-called franchise tax is invalid because it is a burden on interstate commerce is fully sustained by the following cases:

Crutcher v. Kentucky, 141 U. S., 47;
Allen v. Pullman Co., 191 U. S., 171;
Galveston, etc. Ry. Co., v. Texas, 210 U. S., 217;
Western Union Tel. Co. v. Kansas, 216 U. S., 1;
Ludwig v. Telegraph Co., 216 U. S., 146;
Oklahoma v. Wells Fargo Co., 223 U. S., 298;
St. L. & S. W. Ry. Co. v. Arkansas, 235 U. S., 350;
Wells Fargo Co. v. Nevada, 248 U. S., 165.

That this statute is a regulation of interstate commerce is demonstrated, we submit, by the fact that the legislature at the Extra Session of 1921, (Chap. 102 Sec., 2 Public Laws, Extra Session 1921; Appendix page 68) enacted a law amending this section and attempting to restrict its application to *intra-state* commerce. The amending act does not affect the tax already levied under the orginal act.

Dodge v. National Bank, 109 Fed., 726.

Fourth. The legislature has not levied a tax on property for state purposes as required by Section 3, Article 5, of the Constitution of North Carolina.

Under numerous decisions of the Supreme Court of North Carolina, the provisions of Section 3 of Article 5 of the Constitution of North Carolina that "laws shall be passed taxing by uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also real and personal property according to its true value in money" is mandatory and if the legislature levies any taxes for state purposes it *must* levy an ad valorem tax.

Section 3 of the Revenue Act (Public Laws, 1921, Chap. 34; Appendix page 62) provides that no tax on any property in the state shall be levied for any of the purposes of the state government, and for the first time in the history of the state an attempt has been made to support the state government by the levy of income, franchise, inheritance and similar taxes. This is a radical departure from the tax system which has been in

force in this State since the adoption of the Constitution, and violates the letter and the spirit of that instrument.

> "It is the provision and was the purpose of the constitution that thereafter there should be no discrimination in taxation in favor of any class, person or interest, but that everything, real and personal, possessing value as property, and the subject of ownership, shall be taxed equally and by uniform rule."
>
> Kyle v. Commissioners, 75 N. C., at page 446.

In *Commissioners, v. Tobacco Co.,* 116 N. C., at page 446. Chief Justice Clark, then Associate Justice, says:

> "As to corporations, by all the authorities, it is in the power of the legislature to lay the following taxes, two or more of them in its discretion at the same time: 1. To tax the franchise (including in this the power to tax also the corporate dividends). 2. The capital stock. 3. The real and personal property of the corporation. *This tax is imperative and not discretionary under the ad valorem feature of the constitution.* The shares of stock in the hands of the stockholders. This is also imperative and not discretionary." (Italics added).
>
> "The constitution, Art. 5 Sec. 3, commands that: Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money. It is apparent from an examination of the taxing laws of the State that the legislative department has attempted to observe and enforce *the mandate of the constitution.*" (Italics added).
>
> Manning, J., in Pullen v. Corporation Commission, 152 N. C., at page 553.

> "Whatever may have been the intention of the General Assembly in employing language so broad and compre-

hensive, we are forced to the conclusion that under the constitution of North Carolina all real and personal property owned and located within the borders of the State is subject to an ad valorem tax, and it is not to be supposed that the legislature intended to violate the fundamental law of the State, Art. V, Sec. 3, which requires in express terms that all real and personal property be taxed by a uniform rule according to its true value in money. In this respect the constitution 'shows no favor and allows no discretion.' *Wiley v. Commissioners,* 111 N. C., 397; *Puitt v. Commissioners,* 94 N. C., 709; *Vaughn v. Murfreesboro,* 96 N. C., 319. The imperative demand to levy the property tax upon the assessed value is in no way connected with the right to levy an inspection tax, or a tax on trades, professions, etc."

Guano Co. v. Biddle, 158 N. C., at page 212.

Section 3 of Article V is mandatory in requiring that taxation upon the property mentioned in it shall be ad valorem and that whatever tax is levied shall be uniform in its application.

R. R. v. Newbern, 147 N. C., 165;
Bickett v. Tax Commission, 177 N. C., 436.

In *Smith v. Wilkins,* 164 N. C., 140, Justice Allen says:

"In *State v. Worth,* 116 N. C., 1010, the court defines the term 'trades' as including any employment or business embarked in for gain or profit, and while the Constitution, Art. V, Sec. 3, is *mandatory* upon the General Assembly to levy a tax upon all *property* by a *uniform rule,* the authority to tax trades is permissive only, and no rule as to the method is prescribed."

In *Lacy v. Packing Co.,* 134 N. C., page 573, it is said:

"The legislature is sole judge of what subjects it shall select for taxation (other than a property tax, which must be uniform and ad valorem) and the exercise of its dis-

cretion is not subject to approval of the judicial department of the State."

"By the Constitution, Art. V, Sec. 3, all the real and personal property in the State is required to be taxed uniformly according to its value."

R. R. v. Commissioners, 72 N. C., 10.

Article VII, Sec. 9, provides that: "All taxes levied by any county, city, or town or township shall be uniform and ad valorem upon all property in the same, except property exempted by this constitution." In construing this section in *Redmond v. Commissioners*, 106 N. C., 122, the Supreme Court held that it was not intended to apply the rules of uniformity to the subjects alone selected by the Legislature for taxation in granting a municipal charter but requires that *all* property in the municipality shall be taxed, and taxed uniformly and equally. In the opinion of the court, Justice Shepherd says:

"In the absence of constitutional limitations there is, it is said, no restraint whatever upon the Legislature, and it may discriminate in favor of or against a particular class of persons or property, and pass laws in violation of every principle of just government, by an unequal distribution of the public burdens. The check upon such an abuse of power is in the influence of the constituents over their representatives; and the weight of authority is that the courts have no right to interfere with this exercise of the legislative will.

Thus it is seen that a wide field is open for a war between different classes of property, in that one class may be taxed to the exclusion or to the prejudice of another, and that under the forms of a free government, an excited partisan legislative majority may commit wrongs against the rights of property as flagrant and oppressive as those which have disgraced the reigns of the most despotic rulers. But it is said that the General Assembly will be in-

fluenced by proper motives, and will levy taxes upon a just basis.

Experience has shown that the principles of taxation should not be left to the uncertainty or caprice of successive Legislatures, but that they should be fixed and immutable, and embodied in the fundamental law, under whose broad shield all property, of whatsoever species, may be equally protected.

This, we think, was the purpose of the framers of our Constitutioon in inserting therein the section referred to, as well as section 3, Art. 5, relating to State taxation.

No one who reads these and other provisions of the constitution will fail to be impressed with the earnest effort there made to engraft upon our organic law the great principle of equality in taxation."

It cannot be successfully contended that the levy of an ad valorem tax for county purposes complies with the requirements of Section 3 of Article 5 of the Constitution. Such tax is levied under Section 7 of Article 9, which relates to the levy of taxes by counties, cities, towns and townships, and the requirement of uniformity applies only to the property within the borders of the county, city, etc. Certainly the county taxes are not uniform throughout the state, as required by Section 3 of Article 5. (Section 3, Article 5, and Section 7, Article 1 are set out in full in the Appendix, page 61).

In failing to levy a property tax for state purposes a greater proportion of the burden of taxation has been cast upon the complainant in that a proportionate part of the franchise tax of 1-10 of 1 per cent on the assessed value of its property, if this tax is valid as a franchise tax, was levied in lieu of the property tax demanded by the Constitution. The levy of a property tax for state purpose would have obviated in part, if not in whole, the necessity for a franchise tax on railroads.

CONCLUSION

We submit, in conclusion:

1. That complainant has established a case of illegal discrimination in the assessment of its property.

2. That complainant has established the invalidity of the so-called franchise tax.

3. That complainant has established its right to an interlocutory injunction to maintain the *status quo* until the hearing.

4. That complaintant will suffer irreparable injury if such interlocutory injunction is refused, and the defendants will suffer no possible harm if the interlocutory injunction is granted.

Wherefore, we ask this Court to reverse the order of the District Court and direct that the interlocutory injunction be granted for the reasons herein set forth.

Respectfully submitted,

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APPENDIX

EXTRACTS FROM CONSTITUTION OF NORTH CAROLINA

ARTICLE V

Sec. 3. Taxation Shall be by Uniform Rule and Ad Valorem: Exemptions. Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money. . . . The General Assembly may also tax trades, professions, franchises and incomes," etc.

Sec. 6. Taxes Levied for Counties. The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act: Provided, this limitation shall not apply to taxes levied for the maintenance of the public schools of the State for the term required by Article 9, Sec. 3, of the Constitution: Provided, further, the State tax shall not exceed five cents on the one hundred dollars value of property."

ARTICLE VII

Sec. 9. All taxes levied by any county, city, town or township shall be uniform and ad valorem upon all property in the same except property exempted by this Constitution.

EXTRACTS FROM TAX STATUTES OF NORTH CAROLINA

SEC. 3, CH. 34, PUBLIC LAWS OF NORTH CAROLINA, 1921.

Sec. 3 State Taxes.

No tax on any property in the State shall be levied for any of the uses of the State Government. The taxes hereinafter levied in this act are for the expenses of the State Government the appropriations of its educational, charitable, and penal institutions, pensions for Confederate soldiers and widows, the interest on the debt of the State, as equalizing fund for public schools, and other specific appropriations made by law, and shall be collected and paid into the general fund of the State Treasurer.

SEC. 28 (a), CH. 38, PUBLIC LAWS OF NORTH CAROLINA, 1921.

Sec. 28 (a). County Boards to Review Valuation of Real Estate.

The board of county commissioners and the county board of appraisers and review, heretofore appointed under chapter eighty-four of the Public Laws of one thousand nine hundred and nineteen (any vacancy which may have occurred to be filled by appointment of the board of county commissioners), shall meet jointly in each county on the first Tuesday after the first Monday in April, one thousand nine hundred and twenty-one, as a county board of review, to determine if the value of real property as heretofore appraised and assessed in the county as a whole is in excess of the fair value of such property at the time of meeting of such board. The chairman of the board of county commisioners shall be the chairman of the county board of review as thus constituted, and the clerk of the board of county commissioners shall be the secretary of the said board. The said board shall make proper inquiry and investigation into the existing values of real property as compared with the assessed and appraised values thereof in the several cities, towns, and townships of the county; and if it shall find that the assessed value of such property is in excess of the actual value, it shall

find the average percentage of such excess in the county as a whole, or in the several cities, towns, and townships, and shall report its finding so made to the State Tax Commission not later than the twentieth day of April, one thousand nine-hundred and twenty-one. The values so reported shall be the values at which the property shall be assessed for taxation, unless and until the same have been changed and revised by the State Tax Commission and certified to the board of county commissioners of such county, which shall be done not later than the first day of July, one thousand nine hunded and twenty-one.

SEC. 28 (e), CH. 38, PUBLIC LAWS OF NORTH CAROLINA, 1921.

Sec. 28 (e). In any proceedings under this act the county board of review or county board of commissioners, or any of their representatives, shall have access to the questionaires filed by the owners of real property in the county under chapter eighty-four of the Public Laws of one thousand nine hundred and nineteen, the tax rolls for the several townships and any other records pertaining thereto.

It shall be the duty of the State Tax Commission to exercise the authority of supervision herein imposed, to the end that, as nearly as may be, property of all classes in all counties of the State may be fairly and equally valued in accordance with the requirements of the Constitution and the provisions of this act, and if in any case in doubt as to whether changes in valuation in any county should be approved, it shall have the authority, and it shall be its duty, to make or cause to be made such investigations as it may deem necessary to determine the facts and reach a just conclusion.

The words "actual value," as used in the several subdivisions of this section, shall be held to mean the true and actual value of the property if sold in the manner in which such property is usually sold, but not by forced sale thereof, and shall be held and deemed to mean what the property would bring at cash sale when sold in such manner as such properties are usually sold.

SEC. 28 (g), CH. 38, PUBLIC LAWS OF NORTH CAROLINA, 1921.

Sec. 28 (g). Any taxpayer owning property assessed originaly by the State Tax Commission may make application to the State Tax Commission for a review of the assessment of its property in the same manner herein provided for complaint by property owners before the county boards, and the State Tax Commission may hear and determine such complaints.

SEC. 64, CH. 38, PUBLIC LAWS OF NORTH CAROLINA, 1921.

Sec. 64. Tangible and Intangible Property Assessed Separately.

(a) At such dates as real estate is required to be assessed for taxation, the said commission shall first determine the value of the tangible property of each division or branch of such railroad of rolling stock and all other physical or tangible property. This value shall be determined by a due consideration of the actual cost of replacing the property, with a just allowance for depreciation on rolling stock, and also of other conditions, to be considered as in the case of private property.

(b) They shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted), as evidenced by the market value of all capital stock, certificates of indebtedness, bonds, or any other securities, the value of which is based upon the earning capacity of the property.

(c) The aggregate value of the physical or tangible property and the franchise as thus determined, shall be the true value of the property for the purpose of an *ad valorem* taxation, and shall be apportioned in the same proportion that the length of such road in each county bears to the entire length of such division or branch thereof; and the State Tax Commission shall certify, on or before the first day of Sep-

tember, to the chairman of the county commissioners and the mayor of each city or incorporated town the amount apportioned to his county, city, or town; all taxes due the State from any railroad company shall be paid by the treasurer of each company directly to the State Treasurer within thirty days after the first day of July of each year; and upon failure to pay the State Treasurer as aforesaid, he shall institute an action to enforce the same in the county of Wake or any other county in which such railroad is located, adding thereto twenty-five per centum of the tax. The board of county commissioners of each county through which said railroad passes shall assess against the same only the tax imposed for county, township, or other taxing district purposes, the same as is levied on other property in such county, township, or special taxing districts.

SECS. 65, AND 66 CH. 38, PUBLIC LAWS OF NORTH CAROLINA, 1921.

Sec. 65 Railroads.

When any railroad has part of its road in this State and part thereof in any other State, the said commission shall ascertain the value of railroad track, rolling stock, and all other property liable to assessment by the State Tax Commission of such company as provided in the next preceding section, and divide it in the proportion to the length such main line of road in this State bears to the whole length of such main line of road, and determine the value in this State accordingly: Provided, the commission shall, in valuing the fixed property in this State, give due consideration to the character of roadbed and fixed equipment, number of miles of double track, the amount of gross and net earnings per mile of road in this State, and any other factor which would give a greater or less value per mile of road in this State than the average value for the entire system. On or after the first Monday in July the said commission shall give a hearing to all the companies interested, touching the valuation and assessment of their property. The said Commission

may, if they see fit, require all argument and communications to be presented in writing.

SEC. 66. RAILROADS.

If the property of any railroad company be leased or operated by any other corporation, foreign or domestic, the property of the lessor or company whose property is operated shall be subject to taxation in the manner hereinbefore directed; and if the lessee or operating company, being a foreign corporation, be the owner or possessor of any property in this State other than that which it derives from the lessor or company whose property is operated, it shall be assessed in respect to such property in like manner as any domestic railroad company.

SEC. 98, CH. 38, PUBLIC LAWS OF NORTH CAROLINA, 1921.

Sec. 98. Taxes on railroads shall be a lien on property of the same.

The taxes upon any and all railroads in this State, including roadbed, right of way, depots, sidetracks, ties and rails, now constructed or hereafter to be constructed, are hereby made a perpetual lien thereupon, commencing from the first day of May in each current year, against all claims or demands whatsoever of all persons or bodies corporate except the United States and this State; and the above described property or any part thereof may be taken and held for payment of all taxes assessed against said railroad company in the several counties of this State.

CHAPTER 40, PUBLIC LAWS OF NORTH CAROLINA OF 1921.

Sec. 1. From and after the first day of May, one thousand nine hundred and twenty-one, all the powers and duties imposed by any act of law, including Revenue and Machinery Acts, enacted by the present session of the General Assembly, upon the State Tax Commission, shall be transferred to and imposed upon a department to be known as the State Department of Revenue, created by this act, to be administered by the Commissioner of Revenue, to be appointed as provided

in this act. All such powers and duties, except as otherwise provided herein, shall devolve upon the Commissioner of Revenue, and wherever in the revenue laws of the State the words "State Tax Commission" are used, such words shall, after May first, one thousand nine hundred and twenty-one, be held to mean Commissioner of Revenue, except as otherwise provided in this act.

Sec. 2. There is hereby created the office of Commissioner of Revenue, to be appointed by the Governor, by and with the advice and consent of the Senate, and if such appointment is made when the Senate is not in session, confirmation may be made by the Senate at the next session. The term of office shall be for four years from and after the first day of May, one thousand nine hundred and twenty-one, and the succeeding commissioner of revenue shall be nominated and elected in the year one thousand nine hundred and twenty-four, in the manner provided for the nomination and election of other State officers, and quadrennially thereafter.

Sec. 3. The powers and duties now exercised by the State Tax Commission as a State Board of Equalization, and the appellate authority exercised by the said State Tax Commission in determining appeals from valuations made by assessing officers in the several counties of the State, shall, from and after the first of May, one thousand nine hundred and twenty-one, be held and exercised by a State Board of Equalization, composed of the Commissioner of Revenue, the chairman of the Corporation Commission, and the Attorney General, who shall be ex officio members of and constitute the State Board of Equalization, to have and exercise the powers and duties now imposed by law upon the State Tax Commission as a State Board of Equalization, and as an appellate court, to hear and determine appeals from valuation of property by assessing officers in the several counties. The said board shall meet upon call of the Commissioner of Revenue as often as may be necessary to discharge the duties imposed by law upon the said board.

SEC. 82 (6½), CHAP. 34, PUBLIC LAWS OF NORTH CAROLINA, 1921.

Sec. 82 (6½). Railroads.

Every railroad company doing business in this State shall annually on or before the thirtieth day of July make and return to the State Tax Commission, in such form and upon such blanks as shall be furnished by the State Tax Commission, and giving such information as the State Tax Commission shall require, for the purpose of carrying out the provisions of this section, and upon which report the State Tax Commission shall ascertain and certify to the State Auditor the value upon which the amount of taxes which shall be paid by any such raiload company as a franchise or privilege tax shall be calculated. The basis upon which such calculation shall be made by the State Tax Commission and the extent to which every such railroad company is exercising its franchise in this State shall be found to be the value of the property, tangible and intangible, of each such railroad company in the State assessed for the year in which such report is made for ad valorem taxes. The franchise tax of each such railroad company for the privilege of exercising its franchise in this State shall be one-tenth of one per cent (0.1 per cent) of the value so ascertained by the State Tax Commission, and such tax shall be due and payable on or before the fifteenth day of October in each year. If any such company shall fail to make the report provided for, it shall be the duty of the State Tax Commission to make an approximation from the reports and records on file in that department of the amount of taxes due under this section, and certify same to the State Auditor and Treasurer for collection. No county, city or town shall be allowed to collect any taxes under this section.

AMENDMENT OF SECTION 82 (6½), CHAPTER 34, PUBLIC LAWS OF NORTH CAROLINA PASSED BY EXTRA SESSION OF GENERAL ASSEMBLY OF 1921, CHAPTER 102, PUBLIC LAWS EXTRA SSION, 1921.

Sec. 2. That chapter thirty-four, Public Laws of one thous-

and nine hundred and twenty-one, section eighty-two, subsection six and one-half (6½), be and the same is hereby amended so as to read as hereinafter set forth in this section, and as so amended the said subsection six and one-half be and it is hereby transposed from the said section eighty-two to section seventy-eight of the said chapter, to stand as section seventy-eight of the said chapter, and to read as follows, to wit:

PRIVILEGE TAX ON RAILROADS

Every railroad company doing business in this State shall annually, on or before the thirtieth day of July, make and return to the Commissioner of Revenue, in such form and upon such blanks as shall be required and furnished by him, and giving such information as he shall require for the purpose of carrying out the provisions of this section, a report upon which the Commissioner of Revenue shall ascertain and certify to the State Auditor the value upon which the amount of tax to be paid by any such railroad as a license or privilege tax shall be calculated. The value upon which such calculation shall be made by the State Auditor, and the measure of the extent to which every such railroad company is carrying on intrastate commerce within the State of North Carolina, shall be the value of the total property, tangible and intangible, in this State, of each such railroad company as assessed for ad valorem taxation for the year in which such report is made. The tax which every railroad company shall pay for the privilege of carrying on intrastate commerce within this State shall be one-tenth of one per cent, of the value so ascertained and certified by the Commissioner of Revenue, and such tax shall be due and payable on or before the fifteenth day of October in each year. If any such company shall fail to make the report provided for it shall be the duty of the Commissioner of Revenue to make an approximation from the reports and records on file in the State Department of Revenue of the value upon which the amount of tax due by the said company under this section shall be calculated, and to certify the said value to the State Audi-

tor. Upon that value the State Auditor shall then calculate the amount of the said tax, as hereinbefore provided, and shall certify the same to the State Treasurer for collection. No county, city or town shall be allowed to collect any taxes under this section: Provided, that it is the intention of this section to levy upon railroads a license or privilege tax for the privilege of engaging in intrastate commerce carried on wholly within the State of North Carolina and not a part of interstate or foreign commerce; that the tax provided for in this section is not intended to be a tax on the privilege of engaging in interstate commerce, nor is it intended to be a tax on the business of intersstate commerce, nor is it intended to be a tax having any relation to the interstate or foreign business or commerce in which any such railroad company may be engaged in addition to its business in this State.

OCT 4 1922.
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

NO. 382

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,
vs.
A. D. WATTS AND A. D. WATTS AS COMMISSIONER OF REVENUE, ET AL.
Appellee.
IN EQUITY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

BRIEF OF APPELLANT.

THOMAS W. DAVIS,
Solicitor for *Appellant.*
Wilmington, N. C.

GEORGE B. ELLIOTT,
HARRY SKINNER,
H. W. WHEDBEE,
Of Counsel.

R. F. ROBERTS CO. WASHINGTON D. C.

Table of Cases, Acts and Authorities Cited.

PAGE

Act to Refund Taxes Illegally Collected.....19
Adams Express Co. v. Ohio State Auditor, 165 U. S. 194; 166 U. S. 185.....46, 99, 100, 102, 110
Ad Valorem, definitions.....76-79
Albertson v. Wallace, 81 N. C. 479.....81
Allison v. Corson, 88 Fed. 581.....183
American Net & Twine Co. v. Worthington, 141 U. S. 468 174
Armstrong v. Stedman, 130 N. C. 217.....18
Asbel v. Kansas, 209 U. S. 251.....104
A. T. & S. F. R. R. v. O'Connor, 223 U. S. 280.....120
Atlantic & P. Tel. Co. v. Phila., 190 U. S. 160.....14, 20
A. C. L. Ry. Co. v. N. Car. Corp. Com., 206 U. S. 20..148
A. C. L. Ry. Co. v. Dunning, 166 Fed. 850.....12
Bailey v. Fuquay, 22 Miss. 497.....77
Baltic Mining Co. v. Mass., 231 U. S. 68....111, 113, 121
Bank of Commerce v. Commissioners, 2 Black 620....77
Bank Tax Cases, 2 Wall. 200.....76
Bayard v. Singleton, 1 N. C. 43.....189
Benziger v. U. S. 192 U. S. 38.....174
Bisphan's Eq. (6th Ed.).....186
Black on Interpretation of Law.....153
Black on Tax Titles.....78
Blackwell Durham Tobacco Co. v. McElwee, 94 N. C. 425 186
Bordens Condensed Milk Co. v. Baker, 177 Fed. 906..14-20
Brinkley v. Smith, 130 N. C. 224.....18
Brown v. Maryland, 125 U. S. 12.....92-3
Buskirk v. King, 72 Fed. 22, 18 C. C. A. 418.....183
Capehart v. Mhoon, 45 N. C. 30.....186
Chadbourn S. D. & Lbr. Co. v. Parker, 153 N. C. 130...90
C. & E. I. R. R. v. State, 51 N. E. 924..... 75
C. C. C. & St. L. R. Co. v. Backus, 154 U. S. 439...46
Chicago, etc., Co. v. State Board of Equalization, 114 Fed. 557 71
Chin Yow v. U. S., 208 U. S. 13.....148
Choctaw & Gulf Ry. Co. v. Harrison, 235 U. S. 292 114, 116, 136, 172

PAGE
City of Newton v. Lewis, 79 Fed. 715 178-9
Cobb v. Elizabeth City, 75 N. C. 1.....68
Cobb v. Clegg (N. C.) 49 S. E. 80.....185-7
Coleman v. Howell (N. C.) 42 S. E. 554.....185
Combs v. Adams, 63 S. E. 186.....188
Comparison of Sections 82 (3½) and 78.....151-154
Connor on Constitution of N. C., ...64-5, 80-1
Consolidated Gas Case, 157 Fed. 849, 870.....71
Consolidated Statutes of N. C., 1919, Sec. 3950.....150
Consolidated Statutes of N. C., Sec 7979, 1919.....14, 17
Const. of N. C., Art. 5, Sec. 3.....15, 33, 68, 166
Constitution of North Carolina, Art. 5 Sec. 6.....15
Const. of N. C., Art. 7, Sec. 9.....16, 65, 67-9, 166
Cooley on Taxation.....17, 78, 116, 152-3, 176
Coulter v. L. & N. R. Co., 196 U. S. 599 and 131 Fed. 282 .....159, 163
Coulter v. Weir, 127 Fed. 897.....142
Crew Levick v. Pa., 245 U. S. 294.....172
Cummings v. Merchants National Bank, 101 U. S. 153 13, 16, 20-1, 59, 63-4
Davis, D. Gen. v. Wallace, decided January 9, 1922.131-135
Denver & R. G. Ry. Co. v. U. S., 124 Fed. 156.....183
1 Desty on Taxation 104.....153
Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611, 616 137
Dunning v. A. C. L. Ry. Co., 166 Fed. 850.....12
Dwarris on Statutes.....176
Elizabeth City v. Pasquotank County, 146 N. C. 539..155
Evans v. Gore, 253 U. S. 245.....138
Exchange Bank v. Hines, 3 Ohio 1.....59
Ex Parte Lam Fuk Tak, 217 Fed. 468.....147
Ex Parte Lam Pui, 217 Fed. 456.....145-7
Ex Parte 74 Interstate Com. Com.....142, 163
Ex Parte Virginia, 100 U. S. 347.....16
Ex Parte Young, 209 U. S. 123.....12, 17
Fargo v. Hart, 193 U. S. 490..46, 100-1, 107-8, 128, 142
Fargo v. Michigan, 121 U. S. 230.....92
Farmers' Bank v. Minn., 232 U. S. 516.....115
Flint v. Stone Tracey Co., 220 U. S. 107.....106, 108

PAGE

Forty-Two Broadway Co. v. Anderson, 209 Fed. 99...174
Gaar, S. & Co. v. Shannon, 223 U. S. 468.....14
Galveston, Harrisburg, etc., R. R. v. Texas, 210 U. S. 217.....74, 85, 96, 102-13, 116, 139, 168-9, 171-3
Georgia v. Bralesford v. Dall. 402.....183
Gillespie v. Oklahoma, decided by Sup, Ct. Jan. 30, 1922 136, 138
Glascott v. Lang, 3 Myl. & C. 452.....180
Gould v. Gould, 245 U. S. 154.....174
Great Western R. Co. v. Birmingham, etc., R. Co. 2 Phil. Ch. 597.....181
Greene v. L. & N. Ry Co., 244 U. S. 499..12, 14, 20, 58-60, 64
Guano Co. v. Tarboro, 126 N. C. 68.....81
Hadden v. Dooley, 74 Fed. 420.....180-1
Hanges v. Whitfield (DC) 209 Fed. 675..... 146
Heilig v. Stokes, 63 N. C. 612.....186
Herndon v. D. & S. R. R., 77 S. E. 683.....189
Harriman, et al v. Northern Securities Co., et al., 132 Fed. 464 177-184
High on Injunctions (I) 3d Ed.....186
Home Ins. Co. vs. State of New York, 134 U. S. 594.. 75
Howard v. Gypsy Oil Co. 247 U. S. 503.....137
Hyatt v. DeHart, 140 N. C. 270, 52 S. E. 781....18, 188
Income Tax 1921 (N. C.) Sec. 100.....169
Income Tax, 1921 (N. C.) Sec. 101.....169-170
Income Tax, 1921 (N. C.) Sec. 202.....170-71
Indianapolis Gas Co. v. Indianapolis (CC) 82 Fed. 245 183
Indian Terr. Illuminating Oil Co. v. Okla., 240 U. S. 522 136
Insurance Co. v. Stedman, 130 N. C. 221..... 18
International Paper Co. v. Mass., 246 U. S. 135..122-125
International Text Book Co. v. Pigg, 217 U. S. 91....120
Interstate Com. Com. v. Ill. Cent., 215 U. S. 470....148
Interstate Com. Com. v. L. & N. Ry., 227 U. S. 88 .....144, 147-8
Jarman v. Sanders, 64 N. C. 367.....186
Johnson v. Maryland, 254 U. S. 51.....138

PAGE

Judicial Code, Sec. 24 11
Judicial Code, Sec. 266 6
Kansas City, Ft. S. & M. R. v. Botkin, 240 U. S. 227 .121
Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111 ..121
Kerr on Injunctions 179
King County, Wash., v. N. P. Ry. Co., 196 Fed. 325 ..20
Knowlton v. Supervisors, 9 Wis. 422 67
Kyle v. Commissioners, 75 N. C. 445 68-9
Large Oil Co. v. Howard, 248 U. S. 549 137
Latta v. Williams, 87 N. C. 126 67
Lee v. A. C. L. Ry. Co., 150 Fed. 775 11
Leloup v. Port of Mobile, 127 U. S. 640 95
Levy v. Louisville (Ky.) 28 L. R. A. 480 79
Lincoln Gas Co. v. Lincoln, 250 U. S. 256 71
Little Rock v. Board of Improvement, 42 Ark. 162 78
London v. Wilmington, 78 N. C. 109 69
Looney v. Crane, 245 U. S. 178 .....118-122, 124
Louisville & Nashville R. R. Co. v. Bosworth, 209 Fed. 380 .....14, 20, 143-5, 185
Louisville & Nashville R. R. Co v. Coulter, 131 Fed. 282 71
Louisville & Nashville R. R. Co. v. Greene, 244 U. S. 522 .....14, 20
Louisville & Nashville Ry Co. v. Taylor, 86 Fed. 168 .. 16
Louisville & Nashville Ry. Co. v. U. S. et al., 227 Fed. .258
Louisville Trust Co. v. Stone, 107 Fed. 305 16
Lowe v. Commissioners, 70 N. C. 532 186
Low Way Suey v. Backus, 225 U. S. 468 148
Ludwig v. Western Union Telegraph Co., 216 U. S. 146 .....106, 120
Lumber Co. v. Smith, 146 N. C. 199 .....15, 18
Machinery Act, 1921, Sec. 64 ....34, 38-9, 40-1, 43-5
Machinery Act, 1921, Sec. 65 .....23, 46
Machinery Act, 1921, Sec. 98 17
Machinery Act, 1921, Sec. 107 17
Maine v. Grand Trunk Ry., 142 U. S. 217 95-6, 102, 108, 139
Mann v. Allen, 171 N. C. 219 154
Marshall v. Commissioners, 89 N. C. 103 186

PAGE

McAlester-Edwards Coal Co. v. Trapp, 38 Okla. 792...115
McCullough v. Maryland, 4 Wheat. 316.....115
Meyer, Auditor of State of Okla. v. Wells Fargo Co. 223 U. S. 298.....96, 97, 106-8, 109, 116
Milwaukee, Elec. Ry. v. Milwaukee, 87 Fed. 577..... 71
Missouri, Kansas & Tex. Ry. v. Meyer, 204 Fed. 140..115
Mowery v. Salisbury, 82 N. C. 175..... 81
Musser v. Magone, 155 U. S. 247.....148
National Bank v. Kimball, 103 U. S. 732.....15
New Memphis Gas & Light Co. v. Memphis (C.C.) 72 Fed. 952.....183
New York, New Haven & Hartford Ry. Co. v. New York, 165 U. S. 628.....137
Oahu Ry. & Land Co. v. Pratt, 4 Hawaii 126.....138
Ogden City v. Armstrong, 168 U. S. 244.....17
Ohio Tax cases, 232 U. S. 576-592.....17, 112-3, 116
Oklahoma v. Fargo, 223 U. S. 298.....96-7, 106-9, 116
Partington v. Attorney General, L. R. 4 H. L. 100....175
Pelton v. National Bank, 100 U. S. 143.....15
People v. Knight, 67 N. E. 65.....76
Person v. Person, 70 S. E. 752.....186
Phila, & M. S. Co., v. Penna., 122 U. S. 326..93, 96, 110
Pittsburgh, C. C. & St. L. v. Backus, 154 U. S. 424....71
Pollock v. Farmers' Loan & Tr. Co., 157 U. S. 429; 158 U. S. 601.....138
Postal Tel. Co. v. Adams, 155 U. S. 688.....97-8, 121
Providence Savings Inst. v. Mass., 73 U. S. 611.....75
Puett v. Commissioners, 94 N. C. 709.....65,69
Pullen v. Commissioners, 68 N. C. 451.....67
Pullman Co. v. Kansas, 216 U. S. 56.....105, 120
Pullman Co. v. Knott, 235 U. S. 23.....116
Pullman Co. v. Penna.....102-3
Purnell v. Daniel, 43 N. C. 9.....186, 187
Purnell v. Page (N. C.) 45 S. E. 534, 133 N. C. 125 ....15, 18, 185
Ragan v. Farmers Loan & Tr. Co., 145 U. S. 390....16
Range Co. v. Carver, 118 N. C. 328.....14, 18
Ratterman v. W. U. Tel Co., 127 U. S. 411.....95
Raymond v. Chicago U. T. Co., 207 U. S. 20, 13-16, 20, 59, 163

PAGE

Redmond v. Tarboro (N. C.) 10 S. E. 845
65-69, 167-8
Revaluation Act, 1919 53
" Act, 1919, Chap. 84, sec. 2.....156
" Act, 1919, Chap. 84, sec. 5.....156-7
" Act, 1919, Chap. 84, sec. 31..... 36
Revenue Act, Chap. 34, sec. 3.....83-84
Revenue Act, 1921, (NC), Chap. 38.....37
Revenue Act, 1921, (NC), sec. 77..... 81
79a..... 82
80..... 82
81..... 82
82.....85, 7, 9
Revenue Act, Chap. 82 (3½)...9, 24, 85, 86, 87, 88, 89
Revenue Act, 1921, sec. 82 (7).....83
" 82 (8).....83
" 82 (9).....86, 87, 88, 90
" 82 (6½)....24, 73, 83, 84, 88, 89
Robins v. Shelby Taxing District, 120 U. S. 489..... 93
Royster Guano Co. v. Virginia, 253 U. S. 412.....129
Ruling Case Law, vol. 25, p. 962.....88
Ruling Case Law, vol. 25, p. 981..... 88
Ruling Case Law, vol. 25, p. 1048..... 89
Ruling Case Law, vol. 26, p. 32-35..... 80
Russell v. Farley, 105 U. S. 433.....179
Saint L. S. W. Ry. v. Arkansas, 235 U. S. 350,
74, 85, 116-18, 121, 128
Sanford v. Poe, 69 Fed. 546..... 21
Sanitary Reduction Works v. California Reduction Co.,
(CCA) 94 Fed. 694.....183
San Mateo County v. Railroad, 13 Fed. 722..... 16
Santa Clara County v. Railroad, 18 Fed. 385..... 16
Santiago Water Co. v. Santiago, 50 Pac. 633..... 71
Scott v. Donald, 165 U. S. 71..... 16
Seip v. Wright, 91 S. E. 359.....189
Shaffer v. Carter, 252 U. S. 37.....14, 15, 129-30, 137
Shelton v. Platt, 139 U. S. 591.....17
Sherrod v. Dawson, 154 N. C. 525.....15, 18
Shrewsbury v. Chester R. Co. v. Shrewsbury R. Co.,
1 Sim N. S. 410.....182

PAGE
Singer Sewing Machine Co. v. Brickell, 233 U. S. 304..114
Smyth v. Ames, 169 U. S. 466.....12-13, 20
Society for Savings v. Hoyt, 6 Wall. 594.....76
Southern Ry. Co. v. Cherokee Co., 97 S. E. 758.....189
Southern Ry. Co. v. N. C. Corp. Com., 97 Fed 513..174-5
Southern Pacific Ry. v. Earl, 82 Fed. 690, 27 C. C. A. 185 183
Southern Pacific Co. v. Interstate Com. Com., 219 U. S. 433 148
Spring Valley Water Works, 124 Fed. 574.....71
Stanley v. Supervisors, 121 U. S. 535.....15
State v. Bean, 91 N. C. 554.....67
State ex-rel, v. Dombaugh, 20 Oh. St. 167.....135
State v. Greene, 35 S. E. 462.....176
State v. Haynie, 169 N. C. 277.....154
State v. Littlefield, 93 N. C. 614.....155
State v. Stonewall Ins. Co. (Ala.) 7 Sou. 753..... 76
State v. Williams, 61 S. E. 61.....188
State Franchise Tax Case, 15 Wall. 232..... 92
State Franchise Tax Case & Case of State Tax on Railroad Gross Receipts, 15 Wall. 284..... 93
Stearns v. Minn., 179 U. S. 241.....188
Stockard v. Morgan, 185 U. S. 27.....104
Tang Tun v. Edsell, 223 U. S. 681.....148
Taylor v. L. & N. R., 88 Fed. 350.....13, 20, 59, 60-62
Thomas v. Gay, 169 U. S. 264.....115
Thompson v. Pacific R. R., 9 Wall. 579.....115
Tise v. Whitaker Harvey Co., 57 S. E. 210.....188
Tremont & S. Mills v. City of Lowell, 59 N.E. 1007.. 75
Troy v. Norment, 55 N. C. 318.....187
Truax v. Corrigan..... 135
Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 130-131
Union Pacific Ry. Co. v. Colorado, 247 U. S. 282..... 21
Union Pacific Ry. Co. v. Peniston, 18 Wall. 5.....115
Union Tank Line v. Wright, 249 U. S. 275..125-126, 128
United States v. Balto. & O. S. W. Ry. Co., 226 U. S. 14 148

PAGE

United States v. Wigglesworth, 2 Story, 369, Fed. Case No. 16690.....174, 175
United States Express Co. v. Minn. 223 U. S. 335, 109-111, 113
United States Glue Co. v. Oak Creek, 247 U. S. 231...137
Vaughn v. Murfreesboro, 96 N. C. 317..... 69
Waddill v. Masten, 172 N. C. 582.....153-4
Wallace v. Hines, 253 U. S. 66 14, 20, 30, 62, 126-129, 132, 141-2
Washington Water Power Co. v. Kootenai Co., et al., 270 Fed. 369.....58, 63
Washington, ex rel, Ore. R. & Nav. Co., v. Fairchild, 224 U. S. 510.....148
Western Union Tel. Co. v. Alabama, 132 U. S. 472... 95
Western Union Tel. Co. v. Kansas, 216 U. S. 1, 105, 106, 120
Western Union Tel. Co. v. Mass., 125 U. S. 530....93-94
Western Union Tel. Co. v. Taggart, 163 U. S. 1...46, 98
Western Union Tel. Co. v. Texas, 103 Tex. 306.....120
Western Union Tel. Co. v. Trapp, 186 Fed. 114.....15
Weston v. Charleston, 2 Peter 449.....138
William E. Peck & Co. Inc., v. Lowe, 247 U. S. 165....137
Williams v. Talladega, 226 U. S. 404.....113, 138
Winston v. Taylor, 99 N. C. 210.....67
Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S. 301..148
Worth v. Petersburg, R. Co., 89 N. C. 301.....74
Young v. Henderson, 76 N. C. 420.....69
Zakonaite v. Wolf, 226 U. S. 272.....148

INDEX.

PART I.

JURISDICTION

PAGE

1. As to Citizenship 11
2. Amount 12
3. This is not a Suit against the State 12
4. The Tax is in Violation of the Fourteenth Amendment to the Constitution of the United States and of the Commerce Clause of the Constitution of The United States, as well as in Violation of the Constitution of North Carolina 12
5. Uniformity and Equality of Taxation 15
6. The Assessment Casts a Cloud upon Complainant's Title 17
7. Complainant has no Adequate Remedy at Law 17
8. Equity has Jurisdiction to Prevent a Multiplicity of Suits 21

PART II.

FACTS AND CONTENTIONS

1. Summary of Facts 22
2. Contentions of Complainant 25
3. Summary of Facts as to Assessment 26

PART III.

THE ASSESSMENT IS ERRONEOUS AND INVALID.

1. The Assessment of $51,163,717.00 on the Property of Complainant is an Unconstitutional Exercise of the

PAGE

Laws of the State, Otherwise Constitutional, in that the Assessment is not Made in Accordance with the Law, is Excessive and Confiscatory..... 33

2. Equality of Treatment Entitles Complainant to the Same Reduction as was Given in the Case of Other Real Estate 52

3. Capitalization of Earnings..... 70

PART IV.

FRANCHISE TAX.

1. The So-called Franchise Tax of One-tenth Per Cent is an *ad valorem* Tax and Void Because not Levied Except on Railroad Property..... 73

2. Even if the So-called Franchise Tax is Legal, Nevertheless, the Assessment is too High as the Statute Provides in the Case of Complainant that it Should Pay Fifty Per Cent of the Value..... 85

3. As a Tax for the Privilege of Doing Business this Franchise is Void as Being an Interference with and a Burden Upon Interstate Commerce, Because—.. 90

(a) It Taxes the Privilege of Engaging in Interstate Commerce 90

(b) The Receipts Derived Therefrom; and..... 90

(c) As a Tax on Property Located Beyond the Limits of the State.....139

PART V.

THE AMENDMENT OF THE FRANCHISE TAX LAW, PASSED AT THE SPECIAL SESSION OF 1921, DOES NOT VALIDATE THE TAXES ASSESSED IN THIS CASE, NOR DOES THE AMENDMENT CHANGE THE EFFECT OF THE STATUTE 150

PART VI. PAGE

THE DISCRIMINATION IS SYSTEMATIC AND INTENTIONAL 156

1. The Undervaluation of Property Other Than Railroad Property, was Intentional and Systematic.....156
2. The Methods Adopted for the Valuation of the Southern, Norfolk Southern, Atlantic Coast Line and Seaboard Air Line Were Not the Same; Did Not Follow the Statute and are Therefore, Illegal.....161

PART VII.

THE ENTIRE SCHEME OF TAXATION IS ILLEGAL 166

1. Because in Violation of the Uniformity Clause of the Constitution of the State of North Carolina.....166
2. Because in Violation of the Commerce Clause of the Constitution of the United States.....168

PART VIII.

CONSTRUCTION OF TAX STATUTES.....174

PART IX.

THE INJUNCTION SHOULD BE CONTINUED AT THE HEARING.....177

APPENDIX.

Consolidated Statutes, extracts from.....190
Machinery Act, 1921, extracts from.....192
Section 28a 192
" 28b 193
" 28c 194
" 28d 195
" 28e 196
" 28f 196
" 28g 196
Constitution, North Carolina, extracts from.....190
Revaluation Act, 1929 Extracts from.....214
Section 1 214

PAGE

" 2 214
" 3 215
" 4 215
" 5 215
" 7 216
" 7a 216
" 7b 216
" 7d 217
Revenue Act, 1921, extracts from 202
Section 3 202
" 76 202
" 77 202
" 78 203
" 79 203
" 79a 203
" 80 204
" 81 205
" 82 206
" 82 (1) 206
" 82 (2) 206-7
" 82 (3) 207
" 82 (3½) 207
" 82 (4) 208
" 82 (5) 208
" 82 (6) 208-9
" 82 (6½) 209
" 82 (7) 210
" 82 (8) 210
" 82 (9) 210
" 82 (10) 211
" 82 (11) 211
" 82 (12) 211
" 82 (13) 211
" 82 (14) 211
" 82 (15) 211-12
" 82 (16) 212
" 82 (17) 213
" 82 (18) 213
State Tax Commission, transfer of powers and duties of to Commissioner of Revenue 219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

NO. 382

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

vs.

A. D. WATTS AND A. D. WATTS AS COMMISSIONER OF REVENUE, ET AL.
Appellee.

IN EQUITY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

BRIEF OF APPELLANT.

STATEMENT.

This suit was brought in the United States District Court for the Eastern District of North Carolina to restrain the collection of taxes assessed by the Commissioner of Revenue of North Carolina upon the property in North Carolina of the Atlantic Coast Line Railroad Company,

the appellant, hereafter called the complainant. An interlocutory injunction was asked to restrain the collection of—

1. A tax of one tenth of one per cent. upon the *ad valorem* assessment of the property of complainant in North Carolina under Chapter 84, Public Laws of North Carolina, 1921, known as the Revenue Act, upon the ground that it is in confiict with the Constitution of North Carolina and the Constitution of the United States for that it is either—

(*a*) A tax upon real property when no other such tax is levied upon property in North Carolina or upon any other person or corporation, or

(*b*) If not a property tax it is a license or privilege tax upon interstate commerce based upon one-tenth of one per cent. of the value of the property, tangible and intangible, of every railroad in the State assessed for *ad valorem* taxation.

2. To restrain the collection of taxes due certain counties, cities, towns and other subdivisions for that the assessment of complainant's property upon which the tax is levied is illegal and invalid.

3. To restrain the collection of these taxes for that the entire scheme of pyramiding taxes under the tax statutes of North Carolina as a whole levies a tax and burden upon interstate commerce and violates the commerce clause of the Constitution of the United States.

The Court under Section 266 of the Judicial Code, called to his assistance two other judges, to-wit; Circuit Judge Waddill of the Fourth Circuit, and District Judge Boyd, of the Western District of North Carolina. An application for an interlocutory injunction was heard before Circuit Judge Waddill and District Judges Connor and Boyd, who denied the injunction but granted a stay for

a period of thirty (30) days, pending appeal by the complainant to this court. (Record p. 133, 136.) Later, after the record was filed in this court an additional stay was granted by the Court, pending the determination of this appeal.

This brief will be divided into nine parts, which will be subdivided under appropriate heads, and as an appendix there are printed the Sections of the Revenue and Machinery Acts of North Carolina and the Constitution and Consolidated Statutes pertinent to this case.

ASSIGNMENTS OF ERROR.

The formal assignments of error by the plaintiff will be found in the Record, beginning on page 138, but for the purpose of this brief they may be abbreviated, summarized and stated as follows:

1. The Court erred in failing to hold that the *ad valorem* assessment of $51,163,717, as fixed by the Commissioner of Revenue as being the value of the property of the Atlantic Coast Line Railroad Company in North Carolina, was invalid and illegal, because it was not made in accordance with the provisions of the Constitution and the Statute of North Carolina and the plan fixed and established by the Statute of North Carolina was not followed by the Commissioner of Revenue in fixing the assessments, and that the Commisioner of Revenue used a different plan or method in assessing the properties of the different railroads in North Carolina.

2. The Court erred in failing to hold that the manner and method by which the complainant's property was assessed and the plan of valuation followed in arriving at the assessment is illegal, and operates as an unjust and unlawful discrimination against complainant in violation of the provisions of the Fourteenth Amendment to the

Constitution of the United States, and imports into the State of North Carloina values which are elsewhere situate, and deprives complainant of its property without due process of law and denies it the equal protection of the law.

3. The Court erred in failing to hold that the uniformity clause of the North Carolina Constitution and the Fourteenth Amendment to the Constitution of the United States are violated by the action of the Commissioner of Revenue in declining to give to the complainant the same horizontal reduction in the value of its real property as was given to other persons and corporations under the North Carolina Statute permitting such reductions.

4. The Court erred in failing to hold that the scheme of taxation of the State of North Carolina, and the assessment of the properties of the various classes of taxpayers, is, by a settled purpose and intent, so designed and carried out that, while the property of complainant is assessed at its true value in money, the large proportion of the property in the State is assessed at less than its true value in money, thereby casting an undue and excessive burden upon complainant, in violation of the Uniformity Clause of the Constitution of the State of North Carolina and in violation of the Fourteenth Amendment to the Constitution of the United States; and that this appraisal and assessment of the property of other citizens and taxpayers has been long continued and is arrived at under a scheme of taxation which shows an intent to place an undue burden of taxation upon complainant and its property.

5. The Court erred in failing to hold that the so-called franchise or privilege tax is in truth and in fact an additional *ad valorem* or property tax upon complainant's property and, being in excess of the true value for valua-

tion, violates the Constitution of North Carolina and of the United States and is further illegal and invalid, because levied for the support of the State and is not levied equally upon the property of other citizens and taxpayers of the State, and the enforcement thereof deprives complainant of its property without due process of law, contrary to the Constitution of the United States.

6. The Court erred in failing to hold that the so-called franchise or privilege tax is under the statute imposed as a license or privilege tax for the privilege of engaging in interstate and intrastate business, or, if imposed for the privilege of engaging in intrastate commerce, it is measured in part by the value of the privilege of engaging in interstate commerce, in that it is based upon the entire value, including values derived from use in interstate commerce, and is therefore a burden imposed upon interstate commerce and in violation of the Commerce Clause of the United States.

7. The Court erred in failing to hold that if the so-called franchise or privilege tax is imposed for the privilege of engaging in interstate commerce and is valid, it should be assessed against the complainant upon one half of the *ad valorem* value as provided in Section 82, Subsection 3½ of the Revenue Act of North Carolina of 1921, and that the tax assessed against the complainant upon the full value is therefore contrary to law and void.

8. The Court erred in failing to hold that the payment of the so-called franchise or privilege tax is exacted as a condition precedent to the right of the complainant to do "any business" in the State, whether interstate or intrastate, and is therefore unconstitutional and void.

9. The Court erred in failing to hold that the assessment made is void, in that it includes in the value used as a basis for arrival at the franchise or privilege tax the value of the property not used in the business, for which

the privilege is exacted, and such assessment and the enforcement thereof in the manner set forth violates the Fourteenth Amendment to the Constitution of the United States.

10. The Court erred in failing to hold that the tax system of the State of North Carolina, which includes an *ad valorem* tax on the full value of complainant's property in the State, including as a part thereof the value which is due to its use in interstate commerce, plus a franchise or privilege tax upon the full value of said property for *ad valorem* purposes, plus an income tax of three (3) per cent, on its net operating income, does, in practical operation result in a burden upon interstate commerce and violates the Commerce Clause of the Constitution of the United States.

PART ONE.

JURISDICTION.

1. As to Citizenship of Complainant.

In paragraph one of the bill of complaint (Record, p. 7) complainant is alleged to be a corporation of the State of Virginia and a citizen of that State, and not a citizen of North Carolina. In paragraph one of the answer, (Record, p. 47) this allegation of complainant's place of incorporation and citizenship is denied, and in addition it is averred that the complainant is a corporation under the laws of the State of North Carolina and a citizen of the Eastern District of such State. This averment in the bill and denial in the answer, therefore, raises the issue as to complainant's place of incorporation and citizenship. This question does not seem to have been raised in any other pending case.

As we view it, however, the issue so made is, as a matter both of law and of fact, immaterial to the merits of the present controversy, as the jurisdiction of this court in no way depends on the diversity of citizenship of the parties to the cause. This court has jurisdiction of the cause regardless of the citizenship of the parties under the express grant found in section 24 of the Judicial Code. This being true, the question of the citizenship of the complainant may be disregarded as not properly before the court in the instant case.

However, as the question has been raised by the pleadings, all we wish to say is that it would seem to be settled in its favor by the decisions of the Circuit Court of the United States in *Lee vs. Atlantic Coast Line Railroad Co.*, 150 Fed. 775, and of the Circuit Court of Appeals for the

Fourth Circuit in *Atlantic Coast Line Railroad Co. vs. Dunning,* 166 Fed. 850, wherein was affirmed the judgment of the lower court in the *Lee* case.

2. Amount.

In paragraph 3 of the bill (Record p. 8) it is alleged, and the answer (Record, p. 48) admits that the amount involved is in excess of Three Thousand Dollars ($3,000.00).

3. This Is Not a Suit Against the State.

This has been so held by the Supreme Court of the United States in the following cases:

Smyth v. Ames, 169 U. S., 466.
Green v. Railroad, 244 U. S., 499.
Ex Parte Young, 209 U. S., 123.

4. The taxes and assessment are in violation of the Fourteenth Amendment to the Constitution of the United States and of the commerce clause of the Constitution of the United States, as well as in violation of the Constitution of North Carolina.

The bill alleges that the taxes are levied and the assessment was made in violation of the Fourteenth Amendment to the Constitution of the United States as well as in violation of the Constitution of North Carolina (Record, p. 89). The bill alleges, and the answer admits, that the taxes are a lien upon complainant's property. It shows that complainant has no adequate remedy at law, and if the taxes were paid under protest to the various counties, cities, towns, and other subdivisions, that it will be necessary to bring a multiplicity of suits in order to recover back the illegal taxes, and, further, that there is no adequate remedy at law, and that the taxes create a cloud upon the complainant's title.

In the first place it must be borne in mind that there is no statute in North Carolina which permits a railroad to re-

cover back from the State of North Carolina any taxes illegally paid to the State. The State cannot be sued. If the taxes were paid to the counties, cities, towns, and other subdivisions, of the State, and the taxes were found to be illegal, then it would be necessary for this complainant to bring a separate suit against each and every of the separate defendants herein to recover back the illegal portion of the taxes paid.

The facts alleged in the bill bring this case squarely within the decision of *Raymond v. Chicago Union Traction Company,* 207 U. S., page 20. In that case, the Supreme Court, through Mr. Justice Peckham, held that the Court had jurisdiction where it was alleged that there was no adequate remedy at law, and that a railroad would have to bring a multiplicity of suits against each separate body to recover back the portion of illegal taxes collected and would be unable to recover any taxes at all paid to the State.

> *Cummings v. Merchants National Bank,* 101 U. S. 153,
> *Taylor v. Louisville & Nashville Railroad Company,* decision by present Chief Justice Taft, 88 Fed. 350,
> *Smyth v. Ames,* 169 U. S. 466.

The latter case further holds, page 486, that the adequacy or inadequacy of the remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that Court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a State Court on the same cause of action.

Other cases showing the jursidiction of this Court in this case are as follows:—

Green v. Louisville & Nashville Railroad Company, 244 U. S. 499,
Louisville & Nashville Railroad Company v. Green, 244 U. S. 522,
Borden's Condensed Milk Company v. Baker, 177 Fed. 906,
Wallace v. Hines, 253 U. S. 66,
Atlantic & Pacific Telegraph Company v. Philadelphia, 190 U. S. 160,
Louisville & Nashville Railroad Company v. Bosworth, 209 Fed. 380.

The bill alleges that unless these taxes are enjoined the complainant will be subject to various penalties as set forth in the bill for violation of the laws of North Carolina.

In *Wallace v. Hines,* 253 U. S., 66, the Court says:

> "The defendants are the state tax commissioner, the state treasurer, the state auditor, the attorney general and the secretary of state of North Dakota. As the tax is made a first lien upon all the property of the plaintiff railroads in the State, and thus puts a cloud upon their title, and as delay in payment is visited with considerable penalties, there is jurisdiction in equity unless there is an adequate remedy at law against the State to which the tax is to be paid. *Shaffer v. Carter,* 252 U. S. 37, *Gaar, S. & Company v. Shannon,* 223 U. S. 468."

Section 7979 of the Consolidated Statutes of North Carolina, 1919, provides that a taxpayer may pay taxes to the sheriff and sue to recover the whole of it, if illegal, or the illegal portion of it. The statute also provides that an injunction may be granted upon the taxes, or assessment, or some part thereof, if illegal or invalid, or be levied or assessed for illegal or unauthorized purposes.

The Supreme Court of North Carolina in the case of *Range Company v. Carver,* 118 N. C. 328, holds that the effect of this section is to give additional remedy to test the

validity of a tax, leaving it to the discretion of the taxpayer to sue to recover it back or to proceed by injunction.

Sherrod v. Dawson, 154 N. C. 525. See also
Purnell v. Page, 133 N. C. 125,
Lumber Company v. Smith, 146 N. C. 199.

For other authorities upon the question of jurisdiction see

National Bank v. Kimball, 103 U. S. 732,
Pelton v. National Bank, 100 U. S. 143,
Stanly v. Supervisors, 121 U. S. 535,
Western Union Telegraph Company v. Trapp, 186 Fed. 114,
Shaffer v. Carter, 252 U. S. 37.

5. Uniformity and Equality of Taxation.

The Constitution of North Carolina, Section 3, Article 5, provides:—

> "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money. * * * The General Assembly may also tax trades, professions, franchises and incomes," etc.

Section 6 of Article 5 provides:—

> "The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose, and with the special approval of the General Assembly, which may be done by special or general act: provided, this limitation shall not apply to taxes levied for the maintenance of public schools of the State for the term required by article nine, section three, of the Constitution: provided further, the State tax shall not exceed five cents on the one hundred dollars value of property."

Section 9 of Article 7 provides:—

> "All taxes levied by any county, city, town, or township shall be *uniform and ad valorem* upon all property in the same except property exempted by this Constitution."

Whenever the Constitution of the State requires uniformity and equality in taxation these principles must be applied or else there is a denial of the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, and this is so no matter whether it be on account of the State law itself or the administration of the law.

There was a duty here imposed upon the Commissioner of Revenue of North Carolina by the law of North Carolina in the assessments to equalize complainant's assessment with that of others by reducing horizontally its real estate, and this duty of the Commissioner of Revenue to equalize is not a matter of discretion but is mandatory and a violation of that is a denial of the equal protection of the laws.

Raymond v. Chicago Union Traction Company 207 U. S. 20,
San Mateo County v. Railroad, 13 Fed. 722,
Santa Clara County v. Railroad, 18 Fed. 385,
Cummings v. National Bank, 101 U. S. 153,
Louisville & Nashville Railroad v. Taylor, 86 Fed. 168,
Louisville Trust Company v. Stone, 107 Fed 305,
Ragan v. Farmers Loan & Trust Company, 145 U. S. 390,
Ex Parte Virginia, 100 U. S. 347,
Scott v. Donald, 165 U. S. 71.

When jurisdiction is properly attached it extends to the whole case and all issues involved, whether of Federal or non-Federal character, and the Court has authority to decide upon all the questions involved.

Louisville Trust Company v. Stone, supra,
Louisville & Nashville Railroad v. Taylor, supra.

6. The Assessment Casts a Cloud Upon Complainant's Title.

Under Section 98 of the Machinery Act of 1921, the taxes upon any and all railroads in this State, including roadbed, right of way, depots, sidetracks, ties and rails, now constructed or hereafter to be constucted, are made a perpetual lien thereupon commencing from the first day of May of each current year, against all claims or demands whatsoever of all persons or bodies corporate except the United States and this State; and the above described property or any part thereof may be taken and held for payment of all taxes assessed against said railroad company in the several counties in the State.

Section 107 also provides that no mortgage or lien on any property shall be superior to the taxes on said property, whether said mortgage or lien was given prior or subsequent to the levy of the taxes.

These two sections create a lien upon complainant's property which casts a cloud upon the title and a court of equity will interfere to prevent or remove this cloud.

Cooley on Taxation, page 780,
Shelton v. Platt, 139 U. S. 591,
Ohio Tax Cases, 232 U. S. 576,
Ex Parte Young, 209 U. S. 123,
Ogden City v. Armstrong, 168 U. S. 244.

7. Complainant Has No Adequate Remedy at Law.

The Consolidated Statutes of North Carolina, 1919, Section 7979 (see appendix), provide that an injunction shall not be granted by any Court or judge to restrain the collection of taxes nor to restrain the sale of any property for the nonpayment of taxes, *except such tax or the part thereof enjoined be levied or assessed for an illegal or unauthorized purpose or be illegal and invalid, or the assessment be illegal or invalid.*

In construing this statute, the Supreme Court of North Carolina, in *Sherrod v. Dawson,* 154 N. C. 525, at page 528, the opinion being by Mr. Justice Brown says:—

> "An injunction will lie to restrain the collection of taxes and to restrain the sale of property under distraint, for three reasons, to-wit: (1). If the taxes or any part thereof be assessed for an illegal or unauthorized purpose. (2). If the tax itself be illegal or invalid. (3). *If the assessment of the tax be illegal or invalid.* Revisal Sections, 821 and 2855. *Purnell v. Page,* 133 N. C. 125. (Italics ours.)
>
> "In the case of *Lumber Company v. Smith,* 146 N. C. 199, which was an action brought to collect taxes on solvent credits, Justice Connor, writing the opinion of the Court, for an undivided bench, held that injunction is the proper remedy as against delinquent taxes illegally sought to be collected. Upon the same point see also *Armstrong v. Stedman,* 130 N. C. 217. *Insurance Company v. Stedman,* 130 N. C. 221.
>
> "In this case the injunctive relief sought is not merely ancillary to the principal relief demanded in the action but is itself a main relief, for assuredly as to one or the other counties, the tax is illegal and invalid.
>
> "In the case of *Hyatt v. DeHart,* 140 N. C. 270, this Court held that it is the general rule that the Court will not dissolve an injunction where the main relief demanded in the action is injunctive.
>
> "In *Purnell v. Page,* 133 N. C. 129, the present Chief Justice spoke for the Court in these words 'As to the other point, whether the plaintiff can maintain an injunction against the sale of his property under an illegal tax, or must pay the tax under protest and sue to recover it back, it is equally well settled that he can pursue either remedy.'
>
> "*Range Company v. Carver,* 118 N. C. 331, *Armstrong v. Stedman,* 130 N. C. 217, and *Brinkley v. Smith,* 130 N. C. 224, hold that under the language of the statute injunctive relief may be invoked by a taxpayer when the tax is invalid or illegal."

It appears from the decision, therefore, of Judge Brown that the Supreme Court has construed this statute to mean that a taxpayer under the laws of North Carolina is given his choice either of an injunction to restrain the collection of an illegal tax, or pay the same under protest and sue to recover it back.

Subsequent to the institution of this action, by an Act entitled, "An Act to Refund Taxes Illegally Collected and Paid into the State Treasury," Chapter 96 Public Laws, N. C., Extra Session 1921, page 122, ratified the 19th day of December 1921, it was provided as follows:

> "Section 1. Whenever taxes of any kind are or have been through clerical error, or misinterpretation of the law, or otherwise, collected and paid into the State Treasury in excess of the amount legally due the State, the State Auditor shall issue his warrant for the amount so illegally collected, to the person entitled thereto, upon certificate of the head of the department through which said taxes were collected or his successor in the performance of the functions of that department, with the approval of the Attorney-General, and the Treasurer shall pay the same out of any funds in the treasury not otherwise appropriated: Provided, demand is made for the correction of such error or errors within two years from the time of such payment: Provided further, that claims which have arisen within the five years next preceding the ratification of this act shall be presented and made within two years from the ratification of this act."

It is contended by the appellees that the appellant is, by the provisions of this Act, afforded an adequate remedy at law for the payment of the taxes involved in this action. It will be readily noted, however, that the Act cited refers only to taxes paid into the State Treasury, which taxes in this case are only franchise taxes and the franchise tax is a small part of the total taxes involved in the litigation. The

Act does not purport to cover, and it is not claimed that it covers, taxes to be paid the counties, municipalities, road districts, special school districts, etc., and to these latter subdivisions of the State the greater portions of the taxes involved in this case will be paid. Likewise, the Act does not require the payment back, except upon the certificate of the head of the department through which the taxes were collected "with the approval of the Attorney-General." It may or may not be possible to secure the certificate of the head of the Department or the approval of the Attorney General. The State has not consented to be sued and therefore no remedy at law is provided by the Statute.

That the facts alleged in the bill as to the inadequacy of the plaintiff's remedy at law entitle it to the equity jurisdiction of the Federal Courts is clearly shown by the following decisions:

Raymond v. Traction Co., 207 U. S., p. 20;
Cummings v. Merchants Ntl. Bank, 101 U. S. 153;
Taylor v. Louisville & Nashville R. Co., decision by present Chief Justice Taft, 88 Fed. 350;
Smyth v. Ames, 169 U. S. 466;
Greene v. L. & N. R. Co., 244 U. S. 499;
L. & N. R. Co. v. Green, 244 U. S. 522;
Borden's Condensed Milk Co. v. Baker, 177 Fed. 906;
Wallace v. Hines, 253 U. S. 66;
Atlantic & Pacific Tel. Co. v. Philadelphia, 190 U. S. 160;
L. & N. R. Co. v. Bosworth, 209 Federal 380.

In the case of *King County v. Rwy. Co.* 196 Federal, 325, the Court says:

> "The contention that the appellee may pay the tax and thereafter recover it in an action at law does not suggest an adequate remedy, nor, indeed, any remedy at all as to a portion of the tax, for a portion of it goes to the State, and no action may be brought against the State to recover the same."

This is exactly the case which we have. This, therefore, leaves complainant entirely without any remedy at law so far as taxes paid to the State are concerned, as the law requires these to be paid direct to the State Treasurer.

8. Equity Has Jurisdiction to Prevent a Multiplicity Suits.

If complainant were required to pay taxes under protest to each one of the counties, towns, townships, and other subdivisions and special districts, to recover back the money so paid under protest, it would involve the bringing of about one hundred and twenty-five (125) or one hundred and thirty-five (135) suits—that is, a suit against each and every of the defendants in this cause, and an injunction will lie to prevent the levying of illegal taxes where the payment will subject the complainant to a multiplicity of suits to recover back.

Cummings v. National Bank, supra,
Union Pacific Railroad Company v. Colorado, 247 U. S. 282,
Sanford v. Poe, 69 Federal 546.

PART TWO.

FACTS AND CONTENTIONS.

I.

SUMMARY OF FACTS

The following facts are shown in the bill, and the affidavits in support thereof, and the admissions in the answer:

1. That the complainant is a Virginia corporation doing interstate business as a common carrier of freight and passengers, with a total mileage of 4889 miles, of which 1043 miles are in North Carolina (Record p. 7), although the State alleges that more miles than this are owned in the State (Record p. 49). No proof, however, has been produced as to this contention on the part of the State at the time of the writing of this brief.

2. That the Constitution of North Carolina provides that laws shall be passed taxing by a *uniform rule* all monies, credits, investments in bonds, stocks, joint stock companies or otherwise; *and also all real estate and personal property according to its true value in money,* and that the total of the State and county taxes on property shall not exceed fifteen cents on the one hundred dollars valuation of property except where a county property tax is levied for special purposes with the special approval of the General Assembly provided this recommendation shall not apply to taxes levied for maintenance of public schools for the term of six months, and, provided further, that the State tax shall not exceed five cents on the one hundred dollars of property. (Record, p. 9.)

3. That all taxes levied by the State or any county, town or township shall be *uniform and ad valorem upon all property* in the same except property exempted by the Constitution. (Record, p. 11.)

4. That the Commissioner of Revenue, succeeding the North Carolina Tax Commission, shall appraise the property of railroad companies and other corporations exercising the right of eminent domain, with the same powers heretofore given to the State Tax Commission. (Record, p. 10.)

5. That the Commissioner of Revenue in assessing the property of the railroads shall first determine the value of the tangible property of each division or branch of such railroad and all other physical or tangible property and then assess the value of the franchise. That in finding the value of the tangible property it shall be determined by due consideration of the cost of replacing the property with just allowance for depreciation of rolling stock, *and all other conditions to be considered as in the case of private property,* and shall then ascertain the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and, particularly by consideration of the value placed upon the whole property by the State, the physical property being deducted as evidenced by the market value of all capital stock, certificates of indebtedness, bonds or other securities, the value of which is based upon the earning capacity of the property. That the aggregate of the physical and tangible property and franchise thus determined shall be the true value of the property for the purpose of *ad valorem* taxation and shall be apportioned in the same proportion that the length of such railroad in each county bears to the entire length of such division or branch. (Record, p. 10-11.)

6. Section 65 of the Act further provides that the Commissioner shall in valuing interstate roads give due consideration to the character of the roadbed and fixed equipment, number of miles of double track, the amount of net

and gross earnings per mile of road in this State, and any other factor which would give a greater or less value per mile of road in this State than the average value for the entire system. (Record, p. 11.)

7. FRANCHISE TAX. Section 82 (6½) of the Revenue Act provides that upon the value found for *ad valorem* taxes there shall in addition be levied a franchise tax of 1-10 of 1 per cent. This franchise tax is based purely upon the value of the property tangible and intangible, and under Section 82 (3½) it is provided that when the capital stock of a foreign company apportionable in this State is less than one-half of the value of the assessed value for taxes of all the property in this State, the amount of the franchise tax shall be calculated with reference to the sum of one-half of the total of the assessed value of the property of such corporation in this State. (Record, p. 11-12.)

8. That the said Machinery Act provides for a so-called income tax on railroads and public service corporations, calling it a net income tax, but fixes the net income as the gross operating revenue, less the operating expenses, within this State, including in such gross operating revenues in this State the equal mileage proportion within the State on interstate business and deducting from gross operating revenues the proportionate average of operating expenses or operating ratio for the whole business as shown by the Interstate Commerce Commission's Standard Classification of Accounts. From what is thus called the net operating income shall be deducted the uncollectible revenue and taxes paid in this State during the income year other than income tax and excess profit taxes, and the balance shall be determined to be the net income taxable under the act. (Record, p. 12.)

9. That the Legislature of 1921 provided for the County Boards of Review to review the valuation of real

estate and authorized horizontal reductions to be made in real estate, which were made in a number of counties in the State, as set out in the bill, but that the Commissioner of Revenue did not give to the railroads the same horizontal reductions in valuing the railroad property for 1921. (Record, p. 13.)

10. That the State Tax Commission and the Commissioner of Revenue in assessing the property of the railroad did not use or apply the method set out in the statute. It assessed the Atlantic Coast Line Railroad Company on one basis and the Southern Railway on another and the Norfolk-Southern on another, and in assessing the complainant has assessed its property outside of the State of North Carolina, and under no circumstances, and by no rule fixed in the statute can the assessment, either tangible or intangible, be supported. (Record, p. 13-33.)

II.

CONTENTIONS OF COMPLAINANT.

Upon these facts and the additional facts to be herein referred to, the complainant contends:—

1. That the valuation fixed by the Commissioner of Revenue and the assessment certified down upon such valuation is arbitrary and illegal.

2. That the so-called franchise tax is in truth and in fact not a franchise tax but an *ad valorem* tax, and, if not an *ad valorem* tax, then it is a privilege tax on interstate commerce.

3. That even if the so-called franchise tax is legal, nevertheless, the assessment is too high as the statute provides in the case of complainant that it should pay fifty per cent of the value.

4. That the entire scheme of taxation is illegal and void as being a tax on interstate commerce and as being a discrimination against the complainant and taking its property without due process of law, because all of the property, tangible and intangible, including the franchise, is taxed twice, first for local purposes, and, secondly, by the State upon the same assessment, upon which is superimposed a so-called income tax of three per cent upon the receipts derived from interstate commerce.

III.

SUMMARY OF FACTS AS TO ASSESSMENTS.

In 1920 the property of this company was assessed by the State Tax Commission at the sum of $50,867,800.00, of which $39,620,930.00 was tangible and $11,246,870.00 was intangible property. (Record, p. 62.) Complainant protested this assessment and paid these taxes under protest. (Record, p. 51.) In August, 1921, complainant was notified by the Commissioner of Revenue of the assessment of its property at the sum of $51,163,717.00, of which $39,916,847.00 was tangible and $11,246,870.00 was intangible property. (Record, p. 51.) The Commissioner of Revenue refused to advise, as did the State Tax Commission, in 1920, as to how this assessment was arrived at, the assessment for 1919, being $34,645,345.00, of which the tangible property was $51,891,000.00 and the intangible property $18,754,345.00. (Record, p. 77-78.)

The assessment of $51,163,717.00 is in excess of the true value of complainant's property in North Carolina, as such true value is provided by the laws of North Carolina to be found. As pointed out in the bill under no one of the well known plans for valuing corporations—that is, under the gross earnings or net earnings plan, or under the stock or

bond plan, or investment plan, can such figures be arrived at as fixed by the Commissioner of Revenue. The affidavit of Mr. Charles J. Joseph shows the calculations upon each and every plan. (Record, p. 75-82.)

The State Tax Commission, which fixed the assessment in 1920, which assessment the Commissioner of Revenue refused to disturb, in their report to the Government stated that they assessed the railroads upon the basis of their investment account, using the mileage proportion to determine the valuation in North Carolina and to this proportion added the value which they found to represent the intangible value of the North Carolina lines, based upon the volume of business in this State greater than the average volume of traffic on their lines as a whole. This method of valuation is in direct violation of the laws of the State of North Carolina, and any assessment so made is illegal and cannot be enforced. If, however, this figure was not used, and the valuation was figured on the net income, still the valuation is excessive and in excess of the true amount which should be apportioned to this State. The figures reported to the Commissioner of Revenue and the State Tax Commission in response to a request, which figures are based upon the accounting methods of the Interstate Commerce Commission, did not reflect the true amount of the earnings in North Carolina, for as shown in the affidavit of Mr. Prince (Record p. 101-105), in the operating revenues, no deductions, adjustments, or allowances are made or allocated for handling, loading, unloading, and other terminal costs incident to the handling of the trans-state traffic—that is, traffic originating, say, in Florida, and going to New York and passing through North Carolina. Mr. Prince's affidavit further shows that approximately three-fourths of the total operating revenues allocated to the State of North Carolina and derived from interstate busi-

ness; and that according to a test of four months business made in November, 1921, it was developed that of all freight traffic handled in North Carolina fifty-four per cent consisted of trans-state traffic, having neither origin nor destination within said State, and that said trans-state traffic consisted largely of such high class revenue producing commodities as fruits, vegetables, strawberries and other perishable products which are handled in special equipment such as refrigerator and ventilated cars which cars are moved in fast freight service, and that the cost of handling said perishable traffic, considering initial and terminal service incident thereto, is largely in excess of the average cost of handling all business of this complainant and that in crediting North Carolina the straight pro-rate of this revenue on such traffic without any deduction for assembling, terminal and handling charges in connection therewith, and in charging to North Carolina only a ratio of operating expenses applicable to the business of the entire lines, results in allocating to North Carolina a net revenue in excess of that which is actually earned within said State.

Thus the Commissioner of Revenue and the State Tax Commission in assessing the property of this company used the ratio of operating expenses to earnings which was much less than for the entire system and resulted in the over-assessment of the property of this complainant. These various methods of capitalization and the results therefrom are set forth with particularity in Mr. Joseph's affidavit. (Record p. 75.)

In addition to this the Legislature of 1921, permitted horizontal reductions to be made in real estate. These reductions were made in various counties throughout which this railroad runs, as set forth particularly in the bill and admitted in the answer. (Record p. 17-18 and 51.) In four of the counties through which the lines of this railroad run

there was no reduction, and in all of the other counties there were reductions extending from ten to fifty per cent. The average reduction in valuation throughout these counties was 26.11 per cent, but in addition to this there was an average increase of the rates in these counties amounting to 104 per cent. (Record p. 19 and 51.) This complainant contended that it was entitled to have all of its real property reduced to the same extent as was the real property of the citizens in these various counties. It obtained reductions in these counties upon property which it owned and which was not assessed by the Commissioner of Revenue, and he refused to extend to the complainant the reduction to which it was entitled which has the following result:—

In Edgecombe County, for instance, the assessment of real property was reduced 50 per cent. The tax rate was increased 134 per cent. This means that the citizens of Edgecombe County having real estate will pay for the year 1921, due to the increase in rate and decrease in assessment practically no more taxes than in 1920, while this complainant will pay, due to the increase in rate of taxation and the refusal to decrease the assessment, an increase in taxes in Edgecombe County of approximately 134 per cent. This same result obtains throughout the entire system of this railroad in North Carolina. The defendants contend that railroad property was not depressed but that farm property was depressed. Complainant showed to the Commissioner of Revenue, and the record in this case shows that complainant's net operating revenue, less taxes in the State of North Carolina, in 1916, was $3,161,042.16, while in 1920 it fell to the sum of $795,493.78, or a decrease of $2,365,548.38, or 74.81 per cent, while the ratio of operating expenses and taxes to operating revenue increased from 69.41 per cent in 1916 to 97.36 per cent in 1920. (Record p. 29-30 and 63.) Complainant further shows that cotton, leaf tobacco, fertilizer and

29

lumber fell off in movement over its line, and these products bring in large revenue to the complainant; that the falling off in farm products was reflected in the revenues of this complainant. Complainant further shows from the statement attached to the affidavit of Mr. Prince that the total income for the twelve months ending August 31, 1921, was only 2.17 per cent return on its investment. (Record p. 153.) Its net operating revenue in 1919, in North Carolina was $2,087,-975.05, while in 1920, it dropped to $795,493.78. (Record p. 29.)

We give below a table showing the valuation of this company's property under all of the known and recognized rules taken from the bill and affidavits filed in this cause none of which evidence is denied by the State in its answer or affidavits. The calculations shown take in all of the various elements which the State Tax Commission or the Commissioner of Revenue could possibly have taken into consideration under the statute. In the compilation of these figures no property outside of the State, the value of which has been imported into the assessment, has been deducted.

In other words, the tables below are figured on the investment account of the company as set forth in the bill and upon the earnings, market value of its stocks and bonds, the par value of its stocks and bonds and of the compensation paid by the Federal Government from 1917 to 1920. There should necessarily be deducted from these figures the difference between the value in other States and the value in North Carolina as set forth in the case of *Wallace v. Hines,* 253 U. S. 66. There should be deducted the large and valuable terminals and other property outside of North Carolina which has no bearing whatsoever on the property inside of North Carolina. The table is as follows:

On Average Net Earnings, less Taxes, entire system for four years, 1915 to 1918, inclu-

sive, capitalized at six per cent, and allocated to North Carolina on operated mileage basis, the valuation should be $39,729,023
(Record, p. 90.)

Capitalized at seven per cent, the valuation should be 34,053,445

Capitalized at eight per cent, the valuation should be 29,796,767

On the Par Value of its capitalization, stock, bonds, etc., May 1, 1919, allocated to North Carolina on a basis of miles owned, the valuation should be $38,628,301
(Record, p. 77.)

On the Market Value of its capitalization, stock, bonds, etc., May 1, 1919, allocated to North Carolina on a basis of miles owned, the valuation should be $34,551,233
(Record, p. 77.)

On the Federal Compensation, less Corporate Expenses, and Taxes, year 1919, allocated to North Carolina on basis of miles operated, the valuation should be $34,106,346
(Record, p. 99.)

The Property Investment, Book Value Material and Supplies, less accrued depreciation as of May 1, 1919, allocated to North Carolina on a basis of miles owned $40,330,357
(Record, p. 77.)

On Average Net Operating Revenue, less Taxes, entire system for five years, 1916 to 1920, inclusive, capitalized at six per cent, and allocated to North Carolina on basis of operated miles, the valuation should be $32,279,413

Capitalized at seven per cent, the valuation should be 27,668,068

Capitalized at eight per cent, the valuation should be 24,209,650
(Record, p. 28.)

On Average Net Operating Revenue, less Taxes, State of North Carolina, for five

years, 1916 to 1920, inclusive, capitalized at six per cent, the valuation should be $41,730,199

Capitalized at seven per cent, the valuation should be 35,768,742

Capitalized at eight per cent, the valuation should be 31,297,649

(Record, p. 29.)

On Par Value of its capitalization, stock, bonds, etc., on May 1, 1921, allocated to North Carolina on a basis of miles owned, the valuation should be $41,150,362

(Record, p. 30.)

On the Market Value of its capitalization, stock, bonds, etc., on May 1, 1921, allocated to North Carolina on a basis of miles owned, the valuation should be $33,696,925

(Record, p. 64.)

The Property Investment, Book Value Material and Supplies, less accrued depreciation December 31, 1920, allocated to North Carolina on a basis of miles owned, the valuation should be $36,227,090

(Record, p. 81.)

PART THREE.

THE ASSESSMENT IS ERRONEOUS AND INVALID

I.

THE ASSESSMENT OF $51,163,717.00 ON THE PROPERTY OF COMPLAINANT IS AN UNCONSTITUTIONAL EXERCISE OF THE LAWS OF THE STATE, OTHERWISE CONSTITUTIONAL, IN THAT THE ASSESSMENT IS NOT MADE IN ACCORDANCE WITH THE LAW, IS EXCESSIVE AND CONFISCATORY.

This question involved is none the less serious because, while not questioning the right of the State, within constitutional limitations, to impose a proper tax, we are questioning the scheme of assessment as an unconstitutional application by the tax officers of the State to complainant's property, the otherwise valid tax laws of the State.

Since the question involves the taxing power of the State, we should be fair and give the State the benefit of the doubt in this and in each instance of our objection to the various forms of taxes as applied to complainant.

Generally speaking, we do not have to go beyond Section 3 of Article 5 of the Constitution of North Carolina, which provides:

> "Sec. 3. *Taxation shall be by uniform rule and ad valorem: Exemptions.* Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise;

and also all real and personal property, according to its true value in money * * * The General Assembly may also tax trades, professions, franchises and incomes." etc.

If this constitutional provision had been given full consideration, complainant would have no occasion to contend that the assessment for *ad valorem* purposes or for any other legitimate levying of taxes, is excessive. We are not contending that the law passed in pursuance of this constitutional provision, which is the method of assessment fixed by Section 64 of the Machinery Act, is unconstitutional, but, that its application by the tax officers of the State in assembling the assessment complained of, is an unconstitutional and illegal exercise of what is otherwise a constitutional statute. Section 64 of the Machinery Act of 1921, Public Laws of N. C., 1921, page 265, provides for this assessment, as follows:

"(a) At such dates as real estate is required to be assessed for taxation, the said commission shall first determine the value of the tangible property of each division or branch of such railroad of rolling stock and all other physical or tangible property. This value shall be determined by a due consideration of the actual cost of replacing the property, with a just allowance for depreciation on rolling stock, and also of other conditions, to be considered as in the case of private property.

"(b) They shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted), as evidenced by the market value of all capital stock, certificates of indebtedness, bonds, or any other securities, the value of which is based upon the earning capacity of the property.

"(c) The aggregate value of the physical or tangible property and the franchise as thus determined, shall be the true value of the property for the purpose of an *ad valorem* taxation, and shall be apportioned in the same proportion that the length of such road in each county bears to the entire length of such division or branch thereof; and the State Tax Commission shall certify, on or before the first day of September, to the chairman of the county commissioners and the mayor of each city or incorporated town the amount apportioned to his county, city, or town; all taxes due the State from any railroad company shall be paid by the treasurer of each company directly to the State Treasurer within thirty days after the first day of July of each year; and upon failure to pay the State Treasurer as aforesaid, he shall institute an action to enforce the same in the county of Wake or any other county in which such railroad is located, adding thereto twenty-five per centum of the tax. The board of county commissioners of each county through which said railroad passes shall assess against the same only the tax imposed for county, township, or other taxing district purposes, the same as is levied on other property in such county, township, or special taxing districts."

There is no significance in fixing first the value of the tangible property separately except for the purpose of fixing the entire value, which is the intangible value added to the tangible value. Both values, although separated for this purpose, constitute the entire value. The scheme of taxation seems to be, therefore, that the tangible and intangible property shall be the entire value of the property for *ad valorem* taxation, the tangible value being separated for a possible and probable tax to be levied on it alone.

Under this scheme of taxation it is admitted for purposes of argument that a proper assessment for an *ad valorem* tax or the ascertainment of value of railroad property is more or less than the intangible value in different cases. For instance,

we can conceive of a railroad, which by reason of a costly investment account, costly construction and expensive operation, having a large tangible value and yet a low intangible value, because of low earning power. Likewise, we can conceive of a road, fortunately located, inexpensive construction, low investment account and conditions of operation, which will at the same time have an earning power equal to the first mentioned road and that the values of the road for purposes of taxation will be the same. This condition would apply where mere tangible or physical value alone is not the subject of taxation, as seems to be the rule in the State of North Carolina, as prescribed in Section 64 of the Machinery Act.

Tangible value can be seen and assessed separately from intangible value, but intangible value cannot be seen and assessed separately from tangible property. In order, therefore, to assess the entire value, which is a combination of both, some method must be used which in one application will determine both the tangible and intangible value from which deducting the tangible value, assessed separately, the intangible value will be for the first time ascertained.

If these premises are true, there is only one known method of ascertainment of intangible value, and it is the method of capitalizing the net earnings of the railroad or assessing the stock, bonds and certificates of indebtedness and securities of the road, and subtracting from this the already ascertained tangible value and if the subtraction leaves no result there is no intangible value. There may be other methods of assessment, but to be legal and just they invariably embrace the principle involved in the above stated methods.

Under an Act of the General Assembly in the year 1919, (Chap. 84, Public Laws, N. C., p. 115), the property, real and personal and mixed of every citizen of the State of North Carolina, was ordered to be re-valued at its true value in money and in accordance with section 31 of said Act the

State Tax Commission of North Carolina was ordered to make a complete revaluation of the property of all railroads, to be used as a basis for computing taxes for the years 1920, 1921, 1922 and 1923, although the Chairman of the State Tax Commission stated that prior to the revaluation, complainant's property was already assessed at 85 per cent of its actual value relative to other property. (Rec. fol. 114 p. 77.) In 1920, after the revaluation the property of complainant was assessed at $55,929, 629, which after protest and hearing was reduced to the sum of $50,867,800. (Rec. p. 77.) The assessment so fixed was protested and the taxes paid under protest.

In the year 1921, when under the changed law (Chap. 38, Public Laws, N. C., 1921), the Legislature of North Carolina authorized a horizontal reduction in real property, to be effective in the year 1921, and Atlantic Coast Line Railroad Company made application for a reduction in its original assessment, and also on the ground that by reduction of net income allocated to North Carolina from $3,161,042 in 1919, to $795,493 in 1920, and other factors, it decreased the earning power of the road and necessarily its value as made up by its tangible and intangible assets, defendants notified complainant that its assessment for the year 1921, was $51,163,717 or an increase of $295,917 over the assessment of 1920. (Record p. 80.)

It is unnecessary, in an argument such as this, for the purpose of a interlocutory injunction, to do more than state the salient facts, in order to make clear the general principles of complainant's contention. Suffice it to say that in the assessment of the property of complainant in 1920, at approximately $50,000,000 and in not reducing the assessment in 1921, below that sum, the taxing power did not consider the factors set forth in the bill through affidavit, which greatly decreased the value of plaintiff's property, regardless of the revaluation at true value for that year.

In complainant's bill it is alleged that if the method prescribed in Section 64 of the Machinery Act had been followed, the assessed value of complainant's property would have been truly ascertained and it is alleged that the only true method was to capitalize the net income or the method of valuing the stock and bonds and allied securities. (Record, p. 27-31.) The answer of the defendants admits that these were correct methods and the figures stated correctly in the bill, and they were followed, but that other methods, undisclosed, were also followed. (Record p. 63-64.) Therefore, if left to the answer for any proof offered by defendant on this question, it would be impossible to ascertain the method that was followed. However, in the report of the State Tax Commissioner to the Governor of North Carolina, dated August 10, 1921, appearing in the affidavit of C. J. Joseph, Tax Officer of complainant (Record p. 79), it was stated that the Commission valued complainant's property in North Carolina by applying to the State of North Carolina a mileage proportion of complainant's investment account and adding an amount to represent the intangible value of their North Carolina lines, based upon the volume of business in this State, greater than the average volume of traffic on their lines, as a whole. (Record p. 79.) It is clear, therefore, that the tax officers of the State did not follow the rule laid down in Section 64 of the Machinery Act, but merely took the investment account as filed before the Interstate Commerce Commission for valuation for rate making purposes, as ascertaining the tangible value and then merely added an amount in excess of $11,000,000, which was supposed to represent the intangible value, to make up the assessment of approximately $50,000,000. We speak of the assessment as approximately $50,000,000 because there are certain deductions in the bill which the defendants admit should be deducted, leaving the assessment approximately

$50,000,000. (Record p. 51.) We say that this method of assessment was improper because based on the investment account which alone can determine (though improperly in this case) tangible value, but which furnishes no opportunity of ascertaining the intangible value, except by mere guesswork.

We contend that while tangible property can be assessed separately, intangible property cannot be assessed separately, but to arrive at the entire value, tangible and intangible, the entire property must be assessed by the method described in Section 64 of the Machinery Act and this is by capitalizing the net income or the stock and bond method, which alone furnishes a method of arriving at the intangible value by deducting from the entire assessment the tangible value.

Had the tax officers of the State considered the proof offered and admittedly correct, the value of complainant's property in North Carolina could not have been assessed on the par value of stocks and bonds more than approximately $38,000,000 and on the market value of stocks and bonds at approximately more than $34,000,000 and by capitalizing the net operating revenues less taxes at six per cent at more than approximately $34,000,000 and if upon the capitalizing of compensation under the Federal Control Act at approximately more than $34,000,000 (Record, p. 77), and any method of assessment just described, includes both tangible and intangible value, which is the entire value, and except upon mere surmise can the intangible value be determined unless some of these methods are adopted.

A mere statement of figures in argument is confusing. This should be left to the proof which furnishes statement in detail. It is sufficient to say that tested by any known method which will ascertain tangible and intangible value, the assessment of complainant exceeds the true value by ten to eighteen million dollars. The complainant is not in

the position of contending that its property should be assessed on any one element of value. It admits that as a part of this value its value as a going concern should be included. It admits that this value is increased by reason of the fact that it is a through line, going through several States other than North Carolina. It admits that its property in North Carolina can be taxed as an instrumentality of interstate commerce because of the added value that comes to it from its participating in interstate commerce, but that to arrive at its value other than mere tangible value, which involves a consideration of all of the elements above stated, only its earning capacity or the value of its stock and bonds, based upon its earning capacity, can be considered. The details furnishing a basis for critical determination of value are furnished by the proof and have no place and argument unless the proof is in dispute and in this case there can be no dispute which will embarrass the Court in deciding the general principles involved.

Since the assessment of the value of the property of the taxpayer is the basis of taxation, we realize that this allegation of our bill is most important, since the amount of the levy of the various kinds of taxes imposed are but incidental to this question. We trust that we can make the argument sufficiently clear to convince the Court that we are not indulging in any new theory, not justified by the authorities, in our claim that the assessment for 1920 and 1921 is an illegal, confiscatory, unjust and discriminatory assessment—not as a theoretical proposition, but tested by the mandate of the Constitution and the laws of North Carolina, and when we speak of the laws we are speaking of Section 64 of the Machinery Act, which authorizes and directs the assessment. We contend that if the tax officers of the State had followed this statute we would have no complaint as to an excessive, unjust and discriminatory as-

sessment. Before giving an analysis of the statute which we contend proves our view in every respect, we will first illustrate in a simple way our contention. Take an operating railroad, assumed to be worth five dollars. Its physical or tangible value is worth five dollars and can be assessed separately from any other value incident thereto. The first that can be seen and ascertained is tangible value, and the other which cannot be seen is intangible value. If the revenue derived from net operation amounts to sixty cents and we capitalize this on a six per cent basis, sixty cents divided by six shows a value of $10.00. We thus have the entire value—$10.00, and while it is possible to obtain the physical or tangible value by itself, it is impossible to obtain the $10.00 value except by this method, which shows the intangible value of $5.00 when the $5.00 tangible physical value is subtracted from the general result, showing a difference of five dollars. A continuation of this illustration is as follows: If the physical value of a road was found to be $10.00 and its net earnings derived from operation amounted to sixty cents and it was capitalized in the same way as above, its value would be $10.00 and in subtracting the $10.00 physical value from the result it would leave no intangible value, and the entire value for taxation of railroads would be entirely physical value, which is not authorized by Section 64 of the Machinery Act.

Our contention is that this is not merely an assumed theory, but that it is the sole method of assessment authorized and required by Section 64 of the Machinery Act. When we say the sole method we mean that it includes the stock and bond method, which is the valuation of the stock, bonds and allied securities which brings practically the same result, and includes any other method which brings the same result. It is unnecessary to illustrate the situa-

tion, except by the net income method above shown. A justification of our position is an analysis of the statute heretofore quoted in full. It is evidently the legislative intent to tax more than the physical value within the above illustration when in the one case the road has intangible value in addition to physical value. It is also the legislative intent in the other case to tax only physical value when the road has no intangible value, or less than physical value when the net earnings capitalized on a proper percentage basis shows that the value of the road in terms of tangible and intangible value is less than the physical value.

Lest at this stage the Court might understand we are assuming the six per cent as the proper sum to capitalize the net earnings, we are only using this for the purposes of illustration, because we contend that in order to ascertain value on the capitalization of net earnings we should use the prevailing rate of interest, and as the prevailing rate of interest during the period of assessment was more than six per cent, the percentage used should be at least seven per cent, and probably as high as eight per cent. At least, the highest value should not be obtained by taking the lowest rate of interest which railroads had to pay in operating, and possibly not the highest, but, in the interests of a relatively equal assessment, at least the mean of the rate prevailing should have been used, otherwise the result would be to obtain by the lowest rate, the highest value possible under the circumstances. It is shown in paragraph 30 of the bill and not denied in the answer that the prevailing rate of interest in North Carolina actually paid by the railroads and all other industries was greater than the sum of six per cent. (Record, p. 29-64.) The higher rate, of course, on this plan, tends to a lower valuation. The lower the percentage divisor into net earnings, of course, necessarily the greater result.

Analyzing Section 64 of the Machinery Act:
Section (a) provides:

> "* * * The said commission shall first determine the value of the tangible property of each division or branch of such railroad of rolling stock and all other physical or tangible property. This value shall be determined by a due consideration of the actual cost of replacing the property, with a just allowance for depreciation on rolling stock, and also of other conditions, to be considered as in the case of private property."

This physical or intangible value must be determined separately, and as we have stated, it can be seen and determined separately. Section (b) then provides:

> "(b) They shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses. * * *"

This means, of course, as to intangible value, that they shall take the gross earnings and compare them with operating expenses, and then take the net income derived from operation. Now at this stage, this simply means that they shall take the net income and divide it by a proper rate of interest, to capitalize it, and then from the result subtract the physical value previously ascertained, and the result is the intangible value, and both combined constitute the entire value for taxation.

In Section (b) there is an alternative method bringing the same result, because it shows:

> "* * * by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted), as evidenced by the market value of all capital stock, certificates of indebtedness, bonds, or any other securities, the

value of which is based upon the earning capacity of the property."

This is nothing but the stock and bond method, that is, by taking the prevailing value of stocks and bonds, which is the value of the property placed by the public in buying and selling it, from which the entire value is obtained, and deducting the physical or tangible value previously ascertained, leaves the intangible value, both combined being the ascertainment of a proper value for taxation. In Section (c) it is stated the assessment is for *ad valorem* taxation, but a discussion of any part of our bill which is controlled by this language should not be mixed with our argument on the question of ascertainment of the value of the property for the general purpose of taxation.

It will be observed that value so obtained or obtained by any other proper method is system value, and such part of the value of the system as is apportioned to the State of North Carolina on an operating mileage basis is regarded free from objection because it is an average value, subject to argument below.

And, while it has been held by numerous decisions of this Court that interstate business cannot be burdened with taxation, nevertheless. an instrumentality of interstate commerce can be taxed in this manner; that the true value of the property so engaged in interstate commerce is taxed properly by this method.

It is also clear that, if the gross income or a proportion thereof on a mileage basis of the entire system is taxed, this constitutes a burden on interstate commerce.

Therefore, in framing Section 64 of the Machinery Act, generally speaking, certainly as a basis of obtaining true and entire value, the framers of this statute made

a perfect map for the guidance of the taxing powers of the State and it is simply a question as contended for by us of the taxing powers disregarding its mandate.

There is another rule that should be observed, and that is, before any value is apportioned to a State as its mileage portion of system value, if there be in another State property of the corporation, not common to the State imposing the tax, of such a nature that while it enhances system value, it is not peculiar in adding value to the State of taxation, it should be deducted. To do otherwise it to import values from other States for purposes of taxation.

This is in no wise contending that the instrumentalities of interstate commerce by system value properly apportioned cannot be taxed. It is well settled by the decisions of this court that common carriers engaged in interstate commerce may be taxed upon their properties within a State valued at such a proportion of the whole value of the capital stock as the length of the line within the State bears to the length of its lines everywhere, deducting the value of real estate and other properties subject to local taxation within the State, notwithstanding the fact that nothing is in terms directed to be deducted for the value of real estate and other property situated and taxed in other States, unless there is something otherwise showing the system of taxation oppressive and unconstitutional. The true value of the line of railroad for taxation in the State is more than an aggregation of the value of separate parts of its operation separately. Whatever of value there may be resulting from a continuous operation of the road is partly attributable to each State in which it operates and each such State has an equal right to reach after a just proportion of that value. Un-

der ordinary conditions the taking of a mileage share of all such value is not a taxing of property outside the State, but there are cases, as, for instance, where the terminal facilities in other States are of enormous value, and of little value in the State where the tax is laid when the proportional mileage basis cannot constitutionally be applied. A State cannot tax the privilege of carrying on commerce among the States, neither can it tax property outside its jurisdiction belonging to persons domiciled elsewhere. The injustice of assuming the value to be evenly distributed according to main track mileage is plainly illustrated in the case of *Wallace v. Hines,* 253 U. S. 66, 64 L. Ed., 782. Other cases sustaining the rules mentioned are as follows:

Western Union Tel. Co. v. Taggart, 163 U. S., page 1.

Adams Express Company v. Ohio State Auditor, 165 U. S. 194, 41 L. Ed., 683.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company v. Backus, 154 U. S. 439, 36 L. Ed., 1041.

Fargo v. Hart, 193 U. S. 490; 48 L. Ed., 762.

That this is a live and controlling question in this case and is not merely a theory of assessment that might or might not be observed in the discretion of the taxing powers, we call the Court's attention to Section 65 of the Machinery Act, which contains the following provision:

> "Provided, the Commission shall, in valuing the fixed property in this State, give due consideration to the character of roadbed and fixed equipment, number of miles of double track, the amount of gross and net earnings per mile of road in this State, and any other factor which would give a greater or less value per mile of road in this State than the average value for the entire system."

It was, therefore, incumbent upon the taxing power, had it followed the statute, to have given consideration to this provision and have credited the earning power of property outside of the State peculiar to the outside State and not existing in the other.

We are making this contention in the instant case of request for injunction, but this is a showing which should be made when the case is determined on the merits.

Therefore, urging that before the net earnings obtained for capitalization are distributed for mileage in the different States, the outside property should be deducted, we propose to show that, under any proper method of ascertaining value, and under any proper observance by the taxing authorities of the mandate of Section 64 of the Revenue Act, complainant has been discriminated against by a grossly unfair assessment of its property for taxation in violating all the constitutional provisions both of the State of North Carolina and of the United States, alleged in the bill.

In 1919, the property of complainant (paragraph 6 of the bill) (Record, p. 13) was assessed at	$34,645,345
of which the tangible property amounted to	15,891,000
and the difference or intangible property,	$18,754,345

At this time the Chairman of the Tax Commission (Record, p. 77) stated that the property of complainant was taxed at 85 cents on the dollar.

When and after the law required all property to be valued at its true value as a basis for computing taxes for 1920, 1921, 1922 and 1923, the assessment was made for 1920, as follows:

Entire assessment, ... $50,867,800
of which the tangible was 39,620,930

and the difference, or intangible $11,246,870
(Record, p. 13.)

Had the Tax Commission pursued the proper method of assessment by taking the net operating revenue, which did not include the year 1919 in the average of the preceding years, the average would have been considerably reduced, because while in 1918 and 1917 and 1916 the average system net earnings exceeded $11,000,000, in 1919 it was below $7,500,000 and in 1920 below $2,000,000. (Record, p. 29.)

Before certifying the assessment there was a considerable credit allowed for reasons foreign to this argument, and which it is needless to refer to. This assessment of 1920 was duly protested, yet the taxes were paid thereon under protest.

The assessment of 1921 was as follows:

Total value $51,163,717
of which the tangible value was 39,916,847

leaving the difference, or intangible value $11,246,870
(Record, p. 22.)

The assessment of 1921, which is the subject of complainant's contention set forth in the bill, was a repetition of the assessment of 1920, because evidently on the same basis and with the same disregard to the rights of complainant as heretofore set forth. In making the assessment for 1921, the net earnings of complainant from operation had been reduced to $1,836,000 from the $7,500,000 of the previous year, and from the sum of $11,000,000 from the previous three years. (Record, p.

25.) This decrease in earning power, and many other factors, lessened the value of complainant's property in 1920, which is practically the same as the assessment for 1921, as against previous years, and shows that, in fixing the assessed values for the years 1920 and 1921, the earning power, which constitutes the basis for assessment of the value of complainant's property, was not considered, and it was the duty of the Tax Commission, not only to consider it, but to be governed by it.

In the interval between 1919 and 1920, property of everyone was supposedly listed at its true value, railroad as well as other property, and what seems to be complete proof of discrimination and unfairness in the original assessment of complainant's property in 1920 and 1921, as compared with other property in the State, is that complainant's property was admittedly assessed in 1919 at 85 per cent of its full value, according to the statement of the Chairman of the Tax Commission. This being true, by a revaluation to true value, if the Tax Commission had even casually observed the mandate of the Legislature in Sections 64 and 65 of the Machinery Act, it could not have increased the figure of 1919 to the figures of 1920 and 1921. There were errors in the assessment of 1921 when it included figures of $297,917 and figures of $78,-601, a total of $376,518, as alleged in paragraphs 19 and 22 of the bill (Record, p. 22-24) and admitted in the answer (Record, p. 55-57), which need not be referred to for any practical purpose in this argument, except that until the bill was filed, no disposition was shown to correct it.

Assuming that we have shown that the Tax Commission should have followed the method of capitalization of net income at a proper percentage, or the stock and bond method, or any other allied justifiable method, the highest assessment that could have been arrived at for the year 1921

was from ten to eighteen million dollars less than the sum of approximately fifty million dollars, the amount found by the taxing power of the State.

To summarize, in assessing the property for 1920 the Commission stated that it took the average for four years value 1915-16-17-18. In these years the net income of the system exceeded $11,000,000. In 1919 it was slightly in excess of $7,500,000, and in 1920 has fallen as low as $1,836,426.

We, of course, cannot finally succeed on the merits, unless the proof will bear out the statements of these figures as the general result. Practically no statement in our bill as to calculations is denied. Complainant shows the tangible value of this company's property was fixed by the State Tax Commission in 1920 as approximately $39,000,000, and the intangible value at approximately $11,000,000, (Record, p. 13), and if the aggregate value of the tangible and intangible property of this company was attempted to be fixed on an earning basis for the four years from 1915 to 1918, inclusive, and North Carolina's proportion of it on a mileage basis, the total assessed value would amount to only $39,000,000, which would leave an intangible value of only approximately $129,000. (Record, p. 81.) If for the same period it had been fixed under the stock and bond basis and allocated to North Carolina on the market value of the stock and bonds as of May 1, 1918, the value of the same would be approximately $38,000,000 (Record, p. 81) and which would leave no intangible value and if the stock or bond plan or any other plan was used, and the proportion of complainant's property located outside of North Carolina, which is not used in its business as a carrier in operating the property in North Carolina, had been deducted, there would be left a much smaller general assessment. If the assessment had

been passed upon Federal compensation received, the true assessment would have been approximately $36,000,000 or approximately $3,000,000 less than the assessed value of tangible property. (Record, p. 81.) When we consider, however, that the net operating revenues of the company decreased in 1921 materially from what they were previous to the year 1919, our contention is obviously correct that this great decrease should have been taken into consideration and that if the capitalization of net earnings was based on an average of years from 1915 to 1920 the result would have been $32,279,413, which would have left no intangible value. (Record, p. 82.)

Obviously our contention is correct when we show that the only true method of assessing the value of property is provided by the laws of North Carolina and that the Tax Commission has not followed this law. It has violated, not only the statute law, but the Constitution of North Carolina in providing for equal taxation, which means an equal relative assessment, and the Constitution of the United States preventing interstate commerce from being burdened and the Constitution of the United States guaranteeing due process of law and the equal protection of the laws. A careful review of the admissions of the answer and the admission of the correctness of the figures stated in the bill, will show that in making this assessment, which, until corrected, is operating on complainant today, the Tax Commission, as stated in its annual report to the Governor, based the assessment "upon a mileage proportion of the investment account, which they have asked the Interstate Commerce Commission to adopt for making their rates and to this mileage proportion, we have added the value which we find to represent the intangible value of their North Carolina lines, based upon the volume of business in this

State, greater than the average volume of traffic on their lines, as a whole." (Record p. 78, 79, 122.)

They, therefore, undertook to base their assessment of tangible values separately upon an investment account shown by a statement to the Interstate Commerce Commission required for the wholly different purpose of ascertaining the value for rate making and found this figure at approximately $39,000,000 for both the years 1920 and 1921, and as no proper method was adopted for the assessment of intangible property, the amount of $11,000,000 so found was necessarily found by simply assuming the figures without any proper basis for the assumption in order to reach an entire assessment of $50,000,000 in round figures.

On the question of preliminary injunction, an analysis of the statute and general principles of law governing in connection, admitted calculations are quite sufficient to show that the method of assessment adopted was vicious in itself and certainly on any method of assessment which could pass the sanction of the law governing, the assessment of $50,000,000 exceeds the true assessment which should have been imposed in the assessment for 1920, and 1921, by over ten to eighteen million dollars. The law being once decided, the calculations of the amount of assessment which should be allowed should be left to an appropriate method of investigation on the permanent hearing.

II.

EQUALITY OF TREATMENT ENTITLES COMPLAINANT TO THE SAME REDUCTION AS WAS GIVEN IN THE CASE OF OTHER REAL ESTATE.

The assessment of the property of complainant being for the purpose of *ad valorem* taxes to be collected only by

counties, municipalities, and special districts, fixed by the Commissioner of Revenue, and referred to the said counties, municipalities and special districts, on a mileage basis, as a part of the whole, and the county assessors having horizontally reduced the value of real estate in said counties, which real estate goes to make up the whole of the general assessment for *ad valorem* purposes of railroad property, such general assessment as may be generally declared by this Court to be legal as an original proposition should be reduced as a whole by the average reduction of the assessment of real estate in the said counties, municipalities and special districts, and the failure to do this is an unconstitutional exercise of power otherwise valid.

After the Revaluation Act, the property and the apportionment thereof, in North Carolina, was supposed to be assessed at its true value, although this was not done as we will hereafter show.

The Revaluation Act was passed in 1919. (See Appendix.) In March, 1921, the Legislature of North Carolina authorized what is generally known as horizontal reductions in North Carolina (Appendix), that is to say, it gave authority to the tax assessors in the counties to reduce the values in these counties an average percentage. Acting under this authority the valuations and assessments of real estate in the thirty (30) counties through which this complainant's railroad runs, was reduced on an average of 26.11 per cent by horizontal reductions. (Record p. 19 and 51.) The commissioners did not revalue the property in those counties as a whole but applied a percentage reduction in the counties and cities, none of which were equal or in any way alike. One county reduced 10 per cent, one county reduced 50 per cent, etc. (Record p. 20-21.) Counties adjoining each other, and lands adjoining each other, were not reduced the same percentages. The same class, character and quality of land,

of the same soil, and producing the same crops, were reduced different percentages. The act of the Legislature authorizing these reductions in valuation authorized reductions on real estate. This reduction was not limited to real estate owned by individual persons and corporations, other than railroads, for if it had been it would be such a rank discrimination that the Court would declare it invalid upon its face. It must, therefore, be clear that it was the intention of the Legislature that all real estate situated in the various counties, regardless of ownership, should receive the same horizontal reduction.

This complainant, and other railroads, petitioned under the act for a like reduction of all its real property. The Commissioner of Revenue arbitrarily refused any reduction whatsoever upon the ground that he had no authority to do so, and upon the further ground that railroad property had not reduced in value (Record p. 22 and 52), although all the evidence before the Commissioner of Revenue was absolutely contrary to his finding, and, in fact, there was no evidence before the Commissioner of Revenue except that offered by the railroads. It must be borne in mind that the assessment of 1920, was based upon the value as of May 1, 1919. (See Statute in Appendix.) The State in its answer admits the horizontal reduction (par. 17, answer Record p. 54), and admits all the facts and figures set up by the complainant, showing in particular those horizontal reductions throughout the counties through which it operates its railroad. (Par. 12 Bill Record p. 17 and par. 12, answer Record p. 51.) Therefore, it would seem to us, when we have the horizontal reductions in the counties admitted, that without argument or citation of authority, our contention in this respect should be admitted.

The Constitution of North Carolina providing uniformity of taxation, and the Constitution of the United States for-

bidding the burdening of interstate commerce and guaranteeing due process of law and the equal protection of the laws, would seem to suggest the legal requirement of allowing the same reduction to all taxpayers from the equal assessments on each previously made.

We respectfully submit that the contention of the defendants that the value of real estate privately owned was assessed relatively higher, and that the reduction on real estate privately owned was to bring it to its true value, while the railroads on the other hand were not overvalued, is absolutely unsound.

We cannot imagine, unless incontrovertible truth should be brought forward, that the taxing system of the State could be so applied at any time as to tax real estate of private owners at a higher valuation than that of a railroad company, and the allegation in the answer in this particular is under the gravest suspicion of inadvertent inaccuracy.

But in support of the justice of allowing this reduction on privately owned real estate and not allowing it to the railroads, it is contended by the defendants that it was necessary to allow the reduction in value of privately owned real estate by reason of the economic conditions then prevailing which reduced this property on account of the crops, but that it was not necessary to allow it to the railroads because railroad property had not decreased in value. (Record p. 53-54.) This argument is unsound because it is based on false statements, and indeed, there is no evidence to support this contention. We do not contend that if real estate privately owned had decreased in value the assessment should not be decreased, but the constitutional provision referred to demands that when it is decreased on one class of real estate, it shall be decreased on that class of real estate belonging to other citizens. The bill and affidavits show that perhaps railroad property had decreased in value more than

real estate privately owned because of conditions that then peculiarly affected railroads, so far as earning powers are concerned, and railroads were rapidly approaching insolvency. (Record p. 75-107.)

It would require very strong proof in considering the question of injunction in this case for the Court to assume, with the facts now before it, that there is any merit whatever in this contention of the defendants, but to make the situation perfectly clear, we have surveyed the State, and have taken the consideration of all conveyances of over one thousand dollars ($1,000.00) in value from January 1st to June 30, 1921, inclusive, and compared the consideration expressed in the deeds with the assessed value of the real estate in each instance, as ascertained, throughout the entire State, and the ratio of assessed to true value is 66.58 per cent. (Record p. 114-118.) We have taken a favorable period of the low value of real estate, because we have taken a period which represents a time nearer the time of extreme depression in value than a time of extreme high value. It was shown, upon the other hand, that complainant's earnings from operation had fallen from $11,000,000, in 1916, to $7,000,000, in 1919, and to $1,800,000 in 1920, and this for the entire system. (Paragraph 29, Bill Record p. 28, paragraph 29 of answer Record p. 62.) The figures for 1921, show considerably reduced earning capacity.

The emphasis of the injustice and discrimination in not giving to the railroads the same percentage of horizontal reduction given to the counties, municipalities and special districts is obvious for it is shown and admitted, as in this case, that the tax levies throughout the counties through which this railroad operates, have been increased on an average of over 100 per cent after horizontal reduction, so that in order to raise the necessary amount of money, if the railroad's assessment is not reduced, by reason of the increased

levy on an unreduced assessment, the taxes of the railroads will be doubled. The refusal of the Commissioner of Revenue, therefore, to allow to this complainant the same reduction on all its real property as was allowed in the case of private persons, violates the uniformity clause of both articles of the Constitution of North Carolina levying taxes for State and county purposes, and places a burden upon railroad companies of paying on a higher assessment of real property than other persons in the counties.

For illustration, take the County of Edgecombe. In that county there was a horizontal reduction of 50 per cent given to persons and corporations other than railroads. (Record, p. 17.) The Commissioner of Revenue, however, certified down to the County of Edgecombe the same allocation of real property of this complainant based upon the assessment made in 1920, which places upon this complainant the burden of paying upon an assessment of over 100 per cent in the County of Edgecombe based upon a tax levy of 134 per cent more than for the year 1920, while the private owners of real property in Edgecombe County will only pay upon a 50 per cent valuation. The result of this is that, while other taxpayers generally paid no more taxes in 1921, due to the decrease in valuation and increase in rate, yet this complainant will, due to the increase in rate of taxation and the refusal of the Commissioner of Revenue to reduce the real property assessment, pay an increase of taxes to Edgecombe County for 1921 of approximately 134 per cent.

It will pay to the County of Nash an increase of taxes upon the same basis of approximately 109 per cent, if the assessment is not changed.

By stipulation (Rec., p. 45) it was agreed between the parties to this case that complainant should pay for

the year 1921 taxes upon an assessment of $34,645,345, pending the hearing of this suit.

On account of the great increase in the rate of taxation due to its horizontal reductions, the benefit of which was not given to the railroads, the complainant paid for the year 1921 to the various counties and municipalities in North Carolina upon such stipulated assessment of $34,645,345, the sum of $446,654, as against the sum of $353,663 on a valuation of $50,867,800 for the year 1920, being an increase in 1920 on a lower assessment of $92,-990. But if it is compelled to pay on a valuation of $50,867,800, it will have to pay as taxes for the year 1921 the sum of $627,067, which will be an increase of $273,403 above the taxes paid for the year 1920, or 177%, which will be an increase of taxes over and above the taxes for the year 1920 for three years of $820,211; whereas, as shown by the illustration taken from Edgecombe County, other taxpayers will have to pay practically only the same amount of taxes they paid in 1920.

This condition is brought about solely by the legislative enactment of North Carolina, as construed and enforced by the Commissioner of Revenue, which, in and of itself, is an intentional and systematic discrimination against an overvaluation of railroad property, and undervaluation of other property, because this horizontal reduction is made without reference to the true value of the properties so reduced.

Equality of treatment entitles complainant to the same reduction as was given in the case of real estate of other persons and corporations.

Greene v. L. & N. Railroad, 244 United States 499,
Washington Water Power Company v. Kootenai County, et al., 270 Federal 369,

Cummings v. Merchants' National Bank, 101 United States 153.

Taylor v. Louisville & Nashville Railroad, 88 Federal 350.

Raymond v. Chicago Union Traction Company, 207 United States 20.

In all of these cases the Court holds that where there has been a systematic undervaluation of property other than railroad property, and a higher valuation upon railroad property, the court will grant relief. There can, it seems to us, be no plainer instance of systematic overvaluation of railroad property than in the present case. The fact that the Legislature authorized horizontal reductions in real estate, and the county boards made these reductions, approved by the State Board of Equalization, without reference whatever to the true value, and that the same reductions were refused to the railroads by the Commissioner of Revenue, shows an intentional and systematic scheme to overvalue the property of railroads and make them bear more than their equal proportion of the burden of taxation. It makes no difference that real estate was horizontally reduced by the county boards and the railroad real estate valued by the Commissioner of Revenue.

In the *Greene* case, *supra,* this Court quoting from the case of *Exchange Bank v. Hines,* which quoted from the *Cummings* case, *supra,* says:—

> "Taxing by a uniform rule requires uniformity not only in the *rate* but also uniformity in the *mode of assessment* upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation."
>
> (Italics ours.)

The Court further says, on pages 515 and 516:—

> "It is equally plain that it makes no difference what basis of valuation—that is, what percentage of full value—may be adopted, *provided it be applied to all alike.* The adoption of the full value has no different effect in distributing the burden than would be gained by adopting 75 per cent, or 50 per cent, or even 10 per cent, as the basis—so long as either was applied uniformly. The only difference would be that, supposing the requirements of the treasury remained constant, the rate of taxation would have to be increased as the percentage of valuation was reduced."
>
> (Italics ours.)

Here, however, so far as railroad property is concerned, not only has there been a refusal to reduce the valuation in conformity with other real estate, but the rate of taxation has been increased, thereby violating the very rule of law laid down by the Court in the *Greene* case.

In the case of *Taylor v. Louisville & Nashville Railroad Company,* 88 Fed. 350, Circuit Judge Taft (now Chief Justice), says, at page 364:—

> "The sole and manifest purpose of the Constitution was to secure uniformity and equality of burden upon all the property in the State. As a means of doing so (conceding the defendant's construction is the correct one), it provided that the assessment should be according to its true value. It emphasized the object of the section by expressly providing that no species of property should be taxed higher than any other species. We have before us a case in which the complaining taxpayer, and other taxpayers owning the same species of property, are taxed at a higher rate than the owners of other species of property. This dies not come about by legislative discrimination, but by the intentional and systematic disregard of the law by those charged with the duty of assessing all other

species of property than that owned by complainant and its fellows of the same class."

The Court further says, page 372:—

"An intentional undervaluation of a large class of property, when the law enjoins assessment at true value, is necessarily designed to operate unequally upon other classes of property to be assessed by other taxing tribunals, who, it may be presumed, will conform to the law."

and on page 374 the Court says, further:—

"The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully-assessed property. And this is true although the particular board assessing the complainant's property may have been *wholly free from fault or fraud or intentional discrimination.*" (Italics ours.)

We desire to call the Court's attention to the fact that there is no method under the laws of North Carolina for equalizing railroad property. The act does not provide for a hearing by the State Board of Equalization and the Attorney General of North Carolina has so ruled. In the *Taylor* case the railroad property was valued at 100 per cent of its actual value and other property at 75 per cent of its value. It will be contended by the State that this Court must first find that there was a systematic intentional undervaluation for fraudulent purposes of discriminating against railroads.

In the *Taylor* case, 88 Federal 350, Judge Taft says, at page 372:

> "An intentional undervaluation of a large class of property, when the law enjoins assessment at true value, is necessarily designed to operate unequally upon other classes of property to be assessed by other taxing tribunals, who, it may be presumed, will conform to the law. In the case at bar the county assessors and Board of Equalization of each county have been actuated in their violations of the law in their desire to reduce, as far as may be, their county's share of the State burdens. Their undervaluations of property have been uniform as to all property in their county but railroads. They could not but know that such undervaluation must work an injustice against the property of railroads, if assessed at its true value by the State board, and taxed for county and State purposes on that basis. In this sense the rule of undervaluations adopted in each county is necessarily 'designed to operate unequally within the meaning of Mr. Justice Miller in the *Cummings* case. The *ratio decidendi* of that case is to be gathered from the facts, and the language of the opinion is to be interpreted in the view of the facts. The case has been commented on by the Supreme Court in a number of subsequent cases, but it has never been modified or over-ruled."

Mr. Chief Justice Taft takes up all of the various cases, summarizes them, distinguishes them, and comes to the conclusion that, where property of persons, other than railroads, is assessed at less than true value, and the railroad property at true value, there is a systematic undervaluation which the Courts will prohibit.

Probably no case has yet been decided which went more fully into this question of undervaluation than the *Taylor* case. It was followed in *Wallace v. Hines* and cases since that time. The case of *Wallace v. Hines* has already been referred to in this brief.

In the *Kootenai* case, 270 Federal 369, decided by the Circuit Court of Appeals of the Ninth Circuit, on February 1, 1921, the Court passed upon an assessment made by the Idaho Public Utilities Commission. The Court says, page 374:—

> "Having seen that the assessment of property other than public utilities was intentionally made by local assessors upon a valuation of 50 per cent of cash value, but the property of appellant, a public utility was deliberately assessed by the State authorities upon a basis of 75 per cent of actual value, we are met with the question whether appellant is entitled to injunction against the excess over which the general property of the State was assessed. Whether or not the State Board of Equalization assessed other utilities upon the basis of 75 per cent of actual value is not vital in the present instance, because if the State board, knowing of the intentional assessment of property generally on a 50 per cent value, assessed the property of appellant on a 75 per cent basis, the fact that they may have assessed other public utilities upon a like basis cannot defeat the right of appellant to relief."

In the *Cummings* case, *supra*, the Court held that, when a rule or assessment of value for purposes of taxation is adopted by those whose duty it is to make assessments, which is intended to operate unequally in violation of the fundamental principles of the Constitution, and when this principle is applied, not solely to one individual, but to large classes of individuals or corporations, equity may interfere to restrain the taxes and unconstitutional exercise of power.

In that case, the valuation of the shares of the bank were estimated at a much higher sum in proportion to their real value than other property, real and personal in the same county, city and State, and this was done under a statute of the State, and by a rule or system deliberately adopted by

the assessors for the avowed purpose of discriminating against the shares of all bank stock. The Court held that the assessment was void as lacking equality. The Court quoted, with approval the Supreme Court of Ohio, as follows:—

> "Taxing by a uniform rule requires uniformity not only in the *rate* of taxation but also uniformity in the *mode of assessment* upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment, as well as in the rate of taxation. But this is not all. THE UNIFORMITY MUST BE CO-EXTENSIVE WITH TERRITORY TO WHICH IT APPLIES. If a State tax it must be uniform over all the State; if a county, town or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution does not stop here. It must be extended to *all property* subject to taxation SO THAT ALL PROPERTY must be taxed alike, *equally*, which is taxing by a uniform rule." (Caps ours.)

It appeared that there were various boards for assessing the property, and various rules for assessing it. There was no uniformity, there was no equalization, and therefore, the Court enjoined the assessment.

But we do not have to go any further to establish our contention in the case at bar than the case of *Greene v. L. & N. Railroad,* 244 U. S. 499. That case came from Kentucky, and the facts in it appear to be that the property of the railroads was taxed upon a different basis than the property of other persons. In the *Greene* case the Court again approves the quotation just above cited, by the Supreme Court of Ohio, in *Exchange Bank v. Hines, supra.*

In *Connor on the Constitution of North Carolina,* page 263, referring to Art. 5, Sec. 3, of the Constitution, it is said:—

"It is the provision, and was the purpose of the Constitution, that thereafter there should be no discrimination in taxation in favor of any class, person, or corporation, but that everything, real and personal, possessing value as property and the subject of ownership, shall be taxed equally and by a uniform rule. In this respect the present Constitution shows no favor and allows no discrimination."

It is further said on the same page:

"No one, who reads these sections and the other provisions of the Constitution, will fail to be impressed with the earnest effort made to engraft upon our organic law the great principle of equality in taxation."

Article 7, Section 9, of the Constitution of North Carolina provides:

"All taxes levied by any county, city, town or township shall be uniform and *ad valorem* upon all property in the same except property exempted by this Constitution."

In *Puitt v. Commissioners,* 94 N. C. 709, the Court held, in referring to this section of the Constitution, that it requires that all taxes, whether levied for State, county, town or township purposes, shall be uniform, and allows no discrimination in favor of any class or person or interest, but requires that all things possessing value and subject to ownership shall be taxed equally and by a uniform rule.

The attention of the Court is directed to the case of *Redmand v. Town of Tarboro,* decided by the Supreme Court of North Carolina, 10 S.E., 845. The opinion was by Mr. Justice Shepard, afterwards Chief Justice, and has not been over-ruled. The decision very clearly shows that the Constitution of North Carolina is such that there can be no discrimination in taxation in favor of any class, person or corporation, but that everything, real and personal, possessing value as property, and the subject of ownership, must

be taxed *equally and by a uniform rule.* It is clear from this decision, and from the decisions of the Federal and Supreme Courts cited, that the assessment involved in this action, and the taxes thereon, are both illegal and void, because not levied uniformly upon all property, and that they represent an intentional systematic discrimination in favor of the property of individuals in the State against that of railroad corporations. Mr. Justice Shepard in this case says:

> "Experience in many of the States has shown that the principles of taxation should not be left to the uncertainty of caprice of successive legislatures, but that they should be fixed and immutable, and embodied in the fundamental law, under whose broad shield all property, of whatsoever species, may be equally protected. This, we think, was the purpose of the framers of our Constitution in inserting therein the sections referred to, as well as section 3 article 5, relating to State taxation. No one who reads these and other provisions of the Constitution will fail to be impressed with the earnest effort there made to engraft upon our organic law the great principle of equality in taxation.
>
> The subjects of every State ought to contribute to the support of the government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the State. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate. In the observation or neglect of this maxim consists what is called the equality of taxation.' Such are the words of the author of "The Wealth of Nations" (book 4 c. 2.) quoted with approval by Judge Cooley (Tax'n, p. 9) and we think that they well illustrate the true spirit and purpose of our constitutional provisions upon the subject.

"We are of opinion that section 9, article 7, was not intended to apply the rules of uniformity and equality to the subjects which the Legislature might alone select for taxation, but that it requires that all property shall be taxed, and taxed in accordance with the said rules. A contrary view was taken by the Court soon after the adoption of the Constitution in the case of *Pullen v. Commissioners,* 68 N. C., 451. The charter enumerated eight subjects of taxation 'beginning with real estate situate in the city, and ending with encroachments on the streets by porches,' etc.; but it did not include moneys, credits, etc. The Court affirmed the opinion of the Superior Court Judge that the Constitution was 'intended to declare simply the manner in which municipal corporations should levy taxes, to-wit, that they should be uniform and *ad valorem,* and not to declare the subjects to be taxed by them.' The decisions in which this case has been cited (such as *Winston v. Taylor,* 99 N. C. 210, 6 S. E. Rep. 114, *State v. Bean,* 91 N. C. 554, *Latta v. Williams,* 87 N. C. 126, and perhaps others), have reference only to the taxing of trades, professions and the like, and, these not being property, are correctly placed within the principle declared therein. Under the construction of the Constitution as declared in *Pullen's* case, it would be in the discretion of the Legislature to unequally distribute the burdens necessarily incident to government, and the worst species of class legislation would be tolerated. It would (says Dixon, C., in *Knowlton v. Supervisors,* 9 Wis. 422) 'make the Constitution operative only to the extent of prohibiting the Legislature from discriminating in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the Legislature 'You shall not discriminate between single individuals or corporations, but you may divide the citizens up into different classes, as * * * the owners of different species or descriptions of property, and legislate for one class, and against another, as much as

you please, provided you serve all the favored and unfavored classes alike;' thus affording a direct and solemn constitutional sanction to a system of taxation so manifestly and grossly unjust that it would not find an apologist anywhere, at least outside of those who are the recipients of its favors.' Such a construction, in our opinion, not only offends the true spirit of the Constitution, but has been distinctly and solemnly repudiated by the uniform decisions of this Court in subsequent cases. These cases decide that, when the taxing power is exercised for a public purpose, the Constitution, and not the Legislature, declares what property shall be taxed; and that it requires that all shall be taxed, and by a uniform rule, and *ad valorem*. This construction is conceded as to State and county taxation, under section 3, article 5, and we are unable to conceive why the same rule should not apply to section 9, article 7, as the langauge of the latter is even more imperative than that of the former. In *Cobb v. Elizabeth City*, 75 N. C. 1, Rodman, J., after quoting section 9, article 7; says 'All taxes, therefore, must be levied as well on personal as on real property, notwithstanding any contrary provision in the charter.' In *Kyle v. Commissioners*, Id. 445, it was decided that 'shares of stock in a national bank are proper subjects of State, county and municipal taxation.' The Court said (Bynum, J., delivering the opinion) that, 'in our view, it was unnecessary for the Revenue Act or the charter of the Town of Fayetteville to tax specifically the national bank shares of either residents or non-residents. * * * The Constitution seizes them, and extracts from them their proportional share of the public burdens. Neither the Legislature nor the town corporation can exempt them from taxation without doing violence to the Constitution.' 'It is the provision and was the purpose of the Constitution that thereafter there should be no discrimination in taxation in favor of any class, person or interest; but that everything real and personal, possessing value as property, and

the subject or ownership, shall be taxed equally and by a uniform rule. In this respect the present Constitution shows no favors and allows no discretion. If, then, the Town of Fayetteville has the power to tax, the Constitution steps forward, and commands that all property shall be taxed, and by a uniform rule.' To the same effect are *Young v. Henderson,* 76 N. C. 420, *London v. Wilmington,* 78 N. C. 109 and *Puett v. Commissioners,* 94 N. C. 709. The language of the Court in these decisions can admit of no question, and, if anything further were needed to sustain the principles there laid down, we have the high authority of the late distinguished chief justice (Smith) in *Vaughan v. Town of Murfreesboro,* 96 N.C. 317, 2 S.E. Reporter 676, who says that the Constitution art. 7, s. 9, 'commands that all taxes levied in any county, city, town, or township shall be uniform and *ad valorem* upon all property in the same, except property exempt by this Constitution; by force of which, notwithstanding the omission in the charter, personal as well as real (property) must be assessed and subjected to the same public burden.' This overwhelming weight of authority so consonant with the principles of equality in taxation everywhere pervading the fundamental law, conclusively establishes the proposition that wherever the taxing power is exercised for a public purpose, all property shall be taxed, notwithstanding any contrary provisions in the general law or the charter."

In the case of *Kyle v. Commissioners,* 75 N. C. 445, Judge Bynum, in delivering the opinion of the Court, among other things, says:

> "For whenever the power of taxation is exercised, all taxes, whether State, county or town, by force of the Constitution must be imposed upon the real and personal property, moneys, credits, investments in bonds, stocks, etc."

It is, therefore, clear that this assessment, and the taxes

thereon, are both illegal and void because not levied uniformly upon all property.

III.

CAPITALIZATION OF EARNINGS.

In paragraph 30 of the Answer (Record, p. 63), the defendants admit that the rate of interest used in capitalizing earnings of railroads of North Carolina in endeavoring to assess their property was six (6) per cent, and claim that that is the only proper rate to use because it is the legal rate of interest in North Carolina.

The bill sets up, and it is not denied, that railroads enjoying highest credit, of which the complainant is one, were at the time of the assessment paying seven (7) per cent and over for money and in some instances as high as eight (8) per cent.

The affidavits filed in the Southern Railroad case, which were by consent filed on behalf of all of the roads, show that the rate of interest *being charged* in North Carolina and elsewhere was then seven (7) per cent and upwards.

This being so, certainly the earnings of the railroad company should be capitalized upon the same basis as the rate of interest which they were paying for borrowed money, and not upon six per cent simply because that is the legal rate fixed by the Statute of North Carolina. It is shown in the bill and not denied in the answer, that this company operates through many southern States and the rates of interest in these States vary from six to eight per cent. (Rec., p. 29.) It is a well known fact that railroads have to borrow money upon bonds, which in nearly all cases are sold in New York, and therefore the rate of interest in the New York market necessarily must be taken into consideration in capitalizing earnings.

In *Lincoln Gas Co. v. Lincoln,* 250 U. S., 256, the Court disapproved the finding that any rate yielding as much as six per cent upon the invested capital should be regarded as confiscatory in view of the undisputable evidence accepted by the master that eight per cent was the lowest rate sought and generally obtained upon capital invested in banking, merchandising and other business in the vicinity, seven per cent being the legal rate of interest in Nebraska. And the Courts have held generally that the rate of interest at which money can be borrowed for investments in business is an important circumstance to be taken into consideration when ascertaining a reasonable return upon property.

Chicago, etc. Co. v. State Board of Equalization, 114 Fed. 557.
Santiago Water Company v. Santiago, 50 Pac. 633.
Consolidated Gas case, 157 Fed. 849-870.
See also *P. C. C. & St. L. R. R. Co. v. Backus,* 154 U. S., 424, 439.
Spring Valley Water Works, 124 Fed. 574.
L. & N. v. Coulter, 131 Fed. 282.
Milwaukee Electric Railway v. Milwaukee, 87 Fed. 577.

The fallacy of defendant's contention is shown when the only reason given for capitalizing railroad earnings at six per cent is that the North Carolina legal rate of interest is six per cent. Suppose, for instance, the legal rate of interest in North Carolina was four per cent, but the railroads were compelled to pay seven per cent. Would it be logical, and would it be just to the railroads, to capitalize the earnings at four per cent when all of the time the railroads were paying seven per cent for the money? The rate of six per cent in North Carolina was fixed because the Legislature in its judgment thought that a yield of six per cent was all that would be necessary to induce people to invest their money in enterprises within the State. This rate was fixed, though, thirty years ago. Times have

changed and conditions of business have changed. If investments in business, however, in North Carolina now yield more than six per cent, then the method of capitalizing of the earnings of the railroads in North Carolina should be changed to correspond with the changing condition.

PART FOUR.

FRANCHISE TAX.

I.

THE SO-CALLED FRANCHISE TAX OF ONE-TENTH OF ONE PER CENT. IS AN AD VALOREM TAX AND VOID BECAUSE NOT LEVIED EXCEPT ON RAILROAD PROPERTY.

This so-called franchise tax is void as being contrary to the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States. The Constitution of North Carolina provides that taxes shall be uniform on real and personal property. The Legislature of North Carolina has levied no *ad valorem* taxes for State purposes on any property except this tax.

The Revenue Act, Section 82 (6½), provides that a tax of one tenth of one per cent upon property, tangible and intangible, be levied on all railroads in the State which were assessed in the year for which report is made for *ad valorem* taxes.

The statute provides:

> "The franchise tax of each such railroad company for the privilege of exercising its franchise shall be one-tenth of one per cent (0.1 per cent) of the value so ascertained by the State Tax Commission."

On corporations generally a tax of one-tenth of one per cent upon the subscribed and issued and outstanding stock of such corporations is levied. Thus it is seen that on railroads, and only on railroads, is a tax levied of one-tenth of one per cent of the value of the property. That can be nothing less than a property tax. This tax, however, is not levied only on tangible property, but is levied

on the tangible and intangible property of the railroad, including the property used in interstate commerce.

In *Galveston, etc., Railroad v. Texas,* 210 U. S. 217, the Court says that neither the State Court nor the Legislature, by giving a tax a particular name, can take from the Court its duty to consider its real nature and effect, and in the case of *St. L. S. W. Railroad v. Arkansas,* 235 U. S. 350, the Court held that it would regard the substance rather than the form, and that the controlling test in determining the nature of the State tax is found in the operation and effect of the statute as applied and enforced.

The Supreme Court of North Carolina, among others, has construed the definition of franchise tax in the case of *Worth v. Petersburg Railroad,* 89 N. C. 301. In this case the Court was considering the constitutionality of a tax imposed upon the gross receipts of a company and upon the capital stock, which was resisted upon the ground that the company was exempted from taxation under its charter.

In defining a franchise tax, as distinguished from an *ad valorem* or property tax, the Court says; at page 306:

> "Whenever a tax is imposed upon a corporation directly by the Legislature, and is not assessed by the assessors, and the amount depends *on the amount of business transacted* by the corporation, and the extent to which it has exercised the privileges granted in its charter *without reference to the value of its property or the nature of the investments made of it,* it is a franchise tax." (Italics ours.)

In this case the Supreme Court of North Carolina clearly defines the line of demarkation between an *ad valorem* and franchise tax by the words *"without reference to the value of its property or the nature of the investments made of it."* The Legislature of North Caro-

lina, however, has fixed this so-called franchise tax based upon the value of the property, the very thing which the Court has excluded as being an element of the franchise tax.

Likewise, this Court in the case of *Home Insurance Company v. The People of the State of New York,* 134 U. S. 594, in quoting from the case of *Providence Savings Institution v. Massachusetts,* 73 U. S. 611, says:

> "Franchise taxes are levied directly by an act of the Legislature; and corporations are required to pay the amount into the State treasury. They differ from property taxes as levied for city and municipal purposes in the basis prescribed for computing the amount and the manner of the assessment and the mode of collection."

and again

> "Comparative valuation in assessing property taxes is a basis of computation in ascertaining the amount to be contributed by an individual, but the amount of the franchise tax depends upon the *business transacted by the corporation* and the extent to which they have been exercise privileges granted in their charter." (Italics ours.)

A franchise tax is not a tax on the property of a corporation, and its validity is sometimes dependent upon this consideration.

> *Tremont & Suffolk Mills v. City of Lowell* (Mass.), 59 NE 1007.

A franchise tax, when applied to domestic corporations, is a tax upon the right of a corporation to exercise the privilege conferred upon it, and is not a property tax.

> *Chicago & Eastern Ill. Railroad v. State,* 51 N. E. 924.

A franchise tax is not levied on property at all, but is imposed on a corporation for the privilege of carrying

on business in the State under the existing corporate franchise granted by the State.

People v. Knight, 67 N. E. 65.

In the case of *Society of Savings v. Hoyt,* 6 Wallace 594, this Court, in the leading opinion in this country, very pertinently shows the distinction between a franchise and property tax, and in substance says, that a franchise tax and a property tax, when the two approach each other, ordinarily may be distinguished by the respective methods adopted of laying them and fixing their amounts. If a tax is imposed directly by the Legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer, irrespective of the nature or value of the taxpayer's assets, it is regarded as a franchise tax; but if the tax is computed upon the valuation of property, and assessed by assessors, either where it is situated or at the owner's domicile, although franchise privileges may be included in the valuation, it is considered a property tax.

In the case of *State v. Stonewall Insurance Company* (Ala.), 7 So. 753, Mr. Justice Clopton, in writing the opinion, makes the following distinction between *ad valorem* and franchise tax. He says:

> "The usual and most certain test is where the tax is upon the capital stock, *eo nomine,* without regard to its value, or at its assessed valuation in whatever it may be invested. If the former, it is a franchise tax. If the latter, a tax upon the property."

In the *Bank Tax Cases,* 2 Wallace 200 the Court had before it the question of the tax upon the capital of a State bank, and held that this tax was a tax on the property of the institution, following the decision of the Court in the case of *Bank*

of Commerce v. Commissioner of Taxes, 2 Blackford 620. In the latter case, the Court in stating the case, says:

"The capital of a bank is taxed under the existing laws upon a valuation like the property of individual citizens, and not as formerly on the amount of the nominal capital without regard to loss or depreciation."

Ad valorem taxes have been variously defined as follows:

"AD VALOREM (Latin, according to value). Phrase used in levying customs duties when the duties on the goods are fixed at rates proportionate to the estimated value of the goods."

—*Standard Encyclopaedia.*

"AD VALOREM duty is levied in proportion to the value *and not quantity of the article imported.* It is an inconvenient form of taxation."

—*Nelson's Encyclopaedia.*

"AD VALOREM, lit, according to value—used to designate duty or charge laid upon goods at a certain rate per centum upon their value as stated in their invoice in opposition to a specific sum upon a given quantity or number."

—*Webster's International Dictionary.*

"AD VALOREM, according to value, applied 1. To customs or duties levied according to marketable value or worth of the goods at original place of shipment as sworn to by owner and verified by customs appraisers."

—*Century Dictionary.*

"AD VALOREM. According to the valuation. Duties may be specific or *ad valorem. Ad valorem* duties are always estimated at a certain percentage on the valuation of the property."

—*Bouvier's Dictionary.*

"AD VALOREM. A tax or duty upon the value of an article or thing subject to taxation."

—*Bailey v. Fuquay,* 22 Mississippi 497, 501.

"AD VALOREM. According to value. Duties are either *ad valorem* or specific. The former when the duty

is laid in the form of a percentage on the value of the property; the latter when it is imposed as a fixed sum on each article or class without regard to its value. The term *'ad valorem tax'* is as well defined and fixed as any other used in political economy, and simply means a tax or duty on an article or thing subject to taxation."

—*Black on Tax Titles.*

Writers on political economy all give the same definition. *Perry,* in his work on political economy, says:

"An *ad valorem* tax is a tax upon so much per centum of the invoice or appraised money value of the goods subject to taxation."

Cooley on Taxation describes *ad valorem* taxes as follows:

"AD VALOREM TAXES. A large proportion of the duties on imports are of this description and so sometimes are many of the taxes which make up internal revenue. The statute levying them prescribes the rule *but requires the action of the appraisers in apportioning them between individuals.* By far, a large proportion of all such taxes is also upon property by valuation, and effect can only be given to it by means of appraisers who value the property and apportion the taxes by assessments."

In *Black on Tax Titles,* Section 83, after defining specific taxes, the writer says:

"But the rule is different with respect to *ad valorem taxes.* Here the intervention of ministerial officers is necessary to effect the apportionment between individuals. Assessors are called upon to assess the value of the property to be taxed, and apportion the shares according to their valuation."

"*Ad valorem* means a quotient part of the existing value of the property, not an adjustment of burdens to each individual man in view of his particular gains or damages."

—*Little Rock v. Board of Improvement,*
42 Arkansas 162.

In *Levy v. Louisville* (Kentucky), 28 L. R. A., 480, 482, the Court says:

> "The *ad valorem* system relates to the assessment and taxation of all property; the income tax, to the product or income from property or from business pursuits. The license tax is one imposed on the privilege of exercising certain callings, professions, or avocations, that, when collected, goes into the State treasury, and when applied to municipal taxations is termed a 'license fee.' A license based on franchises includes the ascertainment of its value, and the mode of determining that value. The power to impose an income tax, a license or franchise tax, is expressly given by the Constitution to the Legislature—and the exercise of such power by municipal governments must be derived from Legislative enactments; but there is no authority, express or implied, conferred by the Constitution on either the State or municipal Legislatures to substitute a license tax in lieu of the *ad valorem* system."

The Constitution of Kentucky in that case was similar to the present Constitution of North Carolina in regard to uniformity and equality. There the law under construction applied an *ad valorem* assessment to real property, and a license tax to personal property; whereas, the Constitution provided that the taxes should be uniform upon all property within the particular limits of the authority levying the taxes, and further provided that all property should be assessed for taxation at its fair cash value.

The Court further says, page 484:—

> "The words 'license tax' imply a burden on that which is not property, but results from its enjoyment or the conduct of the business or calling; and the Legislature assembling after the adoption of the constitution, and composed of some of the leading

members of the constitutional convention, understood the meaning attached to the phrase 'license tax,' and under the title of 'Revenue and Taxation,' in subdivision 4 of chapter 108, imposed a license tax on certain kinds of business, such as a license on taverns, retailing spirituous liquors, on saloons, selling pistols, bowie knives, ten-pin alleys, peddlers, insurance companies, circuses and so on, *showing plainly that its imposition as a tax upon property was not even considered.*" (Italics ours.)

In 26 *Ruling Case Law,* 35, Sec. 19, the distinction between property and excise taxes is well set forth:

"The distinction between property taxes and excises is an inportant one, since in many of the State Constitutions there are different limitations upon the power of the Legislature with respect to the two classes of taxes. The phraseology of the various Constitutions is not invariably the same, and different words are used in the different States to describe the two classes of taxes; but it is believed that there is no substantial difference in actual practice. An excise and a property tax, when the two approach each other, ordinarily may be distinguished by the respective methods adopted of laying them and fixing their amounts. If a tax is imposed directly by the Legislature without assessment, and its sum is measured by the amount of business done, or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise; *but if the tax is computed upon a valuation of property, and assessed by assessors either where it is situated or at the owner's domicile, although privileges may be included in the valuation, it is considered a property tax.* (Italics ours.)

In *Connor on the Constitution of North Carolina, Annotated,* page 271, we find the following quotation:

"Taxes on property and license taxes on the privilege

of doing business are separate and distinct taxes on separate and distinct things."

Albertson v. Wallace, 81 North Carolina 479.

"Taxes on property and taxes on privileges are distinct taxes, and an exemption by special act from one of these taxes does not exempt from the other."

Guano Company v. Tarboro, 126 North Carolina 68.

"A tax on a dog is constitutional. It is not an *ad valorem* tax, but a specific tax for the privilege of keeping a dog."

Mowery v. Salisbury, 82 North Carolina 175.

From the above authorities it will be seen that in no way can this tax come within the definition of a franchise tax. It is a direct assessment on the value of complainant's property, tangible and intangible, assessed for *ad valorem* taxes, made up of property within and without the State of North Carolina, not measured by the amount of business done, nor the capital stock, not imposed directly by the legislature without assessment, not measured by the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer, irrespective of the measure of value of his assets, but requiring the interposition of a separate body to appraise and determine the value.

If this were the sole tax levied for State purposes, it would indicate that the State intended to thus raise its entire revenue for State purposes and endeavor to embrace therein its entire scheme of taxation, and there would be some merit in the claim that it is a just tax, but other taxes are attempted to be raised from this complainant, and this tax cannot exist as a separate franchise tax as it has no element of a franchise tax. The tax as levied differs entirely from other franchise taxes. In Section 77 of the Revenue Act (Public Laws, N. C., 1921, page 188), the privilege tax on chair and sleeping cars is three per cent

of the gross earnings. In Section 79 (a) of the Revenue Act page 189 the annual privilege or license tax on express companies is five dollars ($5.00) per mile when it earns not more than 6 per cent on its capital investment for the previous year; six dollars ($6.00) per mile when it earns as much as seven per cent and less than eight per cent; when it earns eight per cent or more, seven dollars ($7.00) per mile, and a minimum of five dollars ($5.00) per mile. There is a permission also given the towns and cities to levy a municipal license tax. In Section 80 of the Revenue Act, page 189-190, telegraph companies, as a privilege of engaging in business, are required to pay an annual license tax of five dollars ($5.00) for each pole line within the State, provided that nothing shall be construed as permiting an imposition of any tax on interstate commerce or business of the Federal Government. No county shall be allowed to levy such a tax, but towns of certain population can levy an additional tax. By Section 81 of the Revenue Act, page 190, telephone companies shall pay an annual tax of three per cent on the gross receipts of such telephone companies within the State, reckoning for the purpose of ascertainment the amount of such gross receipts the principal of such interstate business done within the State, which is properly credited to North Carolina, and this tax is graduated and lessened according to the investment of property of telephone companies in the State. We have no occasion to suggest that the difference in the revenue on the excise, license or privilege tax, interchangeably named, and imposed upon the companies above mentioned, are justified by any proper classification, and we are not attempting to argue their rights, but we do say that these taxes have the ear marks of franchise or privilege taxes, because they are measured by property and not imposed directly upon the value of property in the form of an *ad*

valorem tax, in contra-distinction to a tax imposed upon the property right of railroads without measurement, limitation in amount, or otherwise. By Section 82 (6½) page 193 of the Revenue Act, railroads alone are singled out as to this franchise or privilege tax for the placing of a tax of one-tenth of one per cent on its entire property. This cannot be thought of as anything but *ad valorem* tax, because it cannot be conceived that it would be the purpose of charging complainant's railroad $50,000.00 as is claimed by the assessment of one-tenth of one per cent on $50,000,000.00; the Southern Railway, $100,000.00; the Norfolk Southern Railroad, $22,000.00; the Seaboard Air Line Railway, $34,000.00; and the Washington & Vandemere Railroad, $356.31 merely for the privilege of doing business within the State. It is a scheme to raise revenue, and not for the privilege of doing business, and must stand or fall as such. It cannot stand, because the law of North Carolina prevents the levying of an *ad valorem* tax.

Another reason why it cannot stand as a franchise tax is, that by Section 82 (7) and 82 (8) page 193 of the Revenue Act, this annual privilege tax is levied one-tenth of one per cent upon the outstanding capital stock of other corporations represented by their property and business in the State. The last tax has the virtue of being measured and limited by capital stock, but not upon its value. We cannot see such distinction between railroads and all other corporations, other than telephone, telegraph, express and Pullman companies, which would justify a classification to warrant an *ad valorem* tax as against railroads under the guise of a franchise tax.

A tax placed upon property as such, that is, upon the value of the property, is never a franchise tax.

The Revenue Act, Chapter 34, Public Laws 1921, Section 3, provides—

"No tax on any property in the State shall be levied for any of the uses of the State Government. The taxes hereinafter levied in this act are for expenses of the State Government, the appropriations to its educational, charitable, and penal institutions, pensions for Confederate soldiers and widows, the interest on the debt of the State, an equalizing fund for public schools, and other specific appropriations made by law, *and shall be collected and paid into the general fund of the State Treasurer.*" (Italics ours.)

If this tax, therefore, as we contend, is an *ad valorem* tax, and certainly all the authorities show that it is an *ad valorem* tax, it cannot be levied, because the Revenue Act expressly prohibits the levying of any tax on property, and this is the only property tax that is levied by the State.

It is true that the Constitution provides that taxes *shall* be levied on property, both real and personal uniformly and *ad valorem,* for State purposes, but the Legislature has seen fit to set aside this Constitutional requirement except in this specific instance.

Therefore, although, as a Constitutional requirement, the *ad valorem* tax should be levied for the purposes of the State, nevertheless, if levied only against railroad property, the tax is void because it is not uniform.

At the Extra Session, 1921, of the Legislature, Chapter 102 of the Public Laws of North Carolina, 1921, pages 128 and 129, Section 82 (6½) of the Revenue Act was amended, so that the tax therein imposed was made to appear to be a privilege tax instead of a franchise tax, but the method of ascertainment of the amount to be collected was in nowise changed. The tax is still based upon the assessment for *ad valorem taxation,* and under the authorities herein cited is an *ad valorem,* although denominated a privilege tax. The amendment will be hereinafter more particularly considered and shown not ap-

plicable to this suit, as it is not retrospective and was passed after the 1921 tax became due and after this suit had been instituted.

Nothing herein referred to as showing that it is an *ad valorem* tax is in any sense affected by its subsequent denomination as a privilege tax. If it is an *ad valorem* tax it is *ad valorem* whether it be called privilege or franchise.

Galveston etc., R. R. v. Texas, supra.
St. L. S. W. R. R. v. Arkansas, supra.

II.

EVEN IF THE SO-CALLED FRANCHISE TAX IS LEGAL, NEVERTHELESS, THE ASSESSMENT IS TOO HIGH AS THE STATUTE PROVIDES IN THE CASE OF COMPLAINANT THAT IT SHOULD PAY FIFTY PER CENT. OF THE VALUE.

Assuming that the franchise tax levied under Section 82 is a valid and proper tax, we contend, that under the provisions of that section itself, the tax so to be assessed against this company should be, not one-tenth of one per cent of the total assessed valuation of its property, but one-tenth of one per cent upon one-half of this total assessed valuation.

Section 82 (3½) provides:—

> "Sec. 82 (3½). That where a report required to be made under the provisions of this section to the State Tax Commission, by any domestic corporation shows capital stock issued and outstanding by any such company to be less than one-half of the assessed value for taxation of all the property of such company in this State for the year in which report

is made, or the report of any foreign corporation shows the proportion of the capital stock of such foreign corporation apportionable to this State under the rules laid down in Section 82 of this act to be less than one-half of the assessed value for taxation of all the property of such company in this State for the year in which such report is made, the measure of the extent to which the corporate franchise of any such corporation is used and the amount of franchise tax to be paid by any such corporation shall be calculated with reference to the sum of one-half of the total assessed value of all the property of such corporation in this State."

Now what this section states is, simply that where the proportion of capital stock of a foreign corporation, apportionable to this State, is less than one-half of the total assessed valuation of its property in this State, then the franchise tax is to be calculated, not upon total assessed valuation, but upon one-half thereof. As a matter of fact, the proportion of the capital stock of this company, apportionable to this State, is less than one-half of the total assessed valuation of its property within this State. The capital stock of the Atlantic Coast Line Railroad Company reported to the Commission was $68,782,900.00, and the amount apportionable to the State on a gross earnings basis is $17,282,391.00. The value found by the Commissioner of Revenue is $51,163,717.00, and one-half of this amount would be $25,681,858.50. It follows, therefore, that the franchise tax should be calculated upon the basis of one-half of one-tenth of one per cent of such assessed valuation, *unless,* by some other provision, railroad corporations have been specifically excluded from the benefits of Sec. 82 (3½).

Sec. 82 (9) provides as follows:

"Sec. 82 (9). That nothing in the nine preceding

sub-sections of this act shall apply to banks, insurance companies, fraternal, beneficent associations, building and loan associations, express, telephone or telegraph companies, or other corporations, upon which a franchise tax may be levied in other sections of this act."

Now, this Section 82 (3½) falls within the nine preceding sub-sections of Section 82 (9). Its provisions apply to all corporations, therefore, except those specifically named in Section 82 (9), or included therein in the phrase "or other corporations upon which a franchise tax may be levied in other sections of this act." Railroads are not specifically exempted from the provisions of the nine preceding sections, by the terms of Section 82 (9), nor do they fall within the class of "other corporations upon which a franchise tax is levied by the other sections of this act," the only franchise tax upon railroads being that levied under Section 82, and included within the nine preceding sub-sections mentioned in 82 (9).

The argument that railroads are included among the corporations entitled to the benefits of Section 82 (3½) is strengthened by reference to the fact, that until the special session of 1921, they were included as one of the exempted corporations under 82 (9). By the change in 1921, such corporations were omitted from those *excluded,* from which the only reasonable inference is that it was intended thereby to *include* them.

The words *"or other corporations upon which a franchise tax may be levied in other sections of this act"* clearly indicate the purpose of the Legislature to exclude from the provisions of Section 82 only those corporations which were not taxed in that section.

That whatever is not specifically excepted is included is a well recognized principle; also that the mention of

one thing implies the exclusion of another thing. *Expressio unius est exclusio alterius,*

25 *R. C. L.* 981.

Unquestionably, therefore, railroads are not excluded from the provisions of Section 82 (3½), and are entitled to the benefits thereof. This is the plain and obvious meaning of the words of the statute, and it is from such plain and obvious meaning that the Legislative intent must be gathered. The fundamental rules of statutory interpretation provide that:

> "No motive, purpose or intent can be imputed to the Legislature in the enactment of law other than such as are apparent upon the face and to be gathered from the terms of the law itself."
>
> 25 *R. C. L.* 962-3.

We have here a plain, obvious, unambiguous provision, and from it there can be but one conclusion, that the Legislature intended under this Act, that railroads, the proportion of whose capital stock, apportionable to this State, is less than one-half of the total assessed valuation of its property in this State, shall, in the calculation of the franchise tax, be taxed upon the basis of one-half of one-tenth of one per cent of such total assessed valuation.

Section 82 (6½) is particular as to railroads, just as other sub-sections are particular as to domestic and foreign corporations, only because of the variety and difference of the data required from each class in order to determine the basis of taxation. Section 82 (3½) is general, and applies alike to all domestic and all foreign corporations, save and except those specifically excluded under 82 (9).

Construing it as we have, there is nothing inharmonious or inconsistent in our contention. If we were, however, to attempt to say, that the imposition of the tax specifically

upon railroads by Section 82 (6½) removes railroads from the provisions of Section 82 (3½), we should immediately create a conflict in meaning. We would have a provision, and there is a denial of the provision by implication of another subsection of the same section. This would be violative of fundamental rules of construction.

"A statute should be so constructed as to render it a consistent and harmonious whole."

25 *R. C. L.* 1048.

Effect can be given to the full meaning of Section 82 (3½) without in the least detracting from the meaning of 82 (6½). The two are perfectly consistent—just as much so as 82 (3½) is consistent with any other sub-sections of Section 82. Section 82 (3½) is in the nature of a proviso, and as such is applicable to all the other sub-sections to which it is pertinent.

Confirmation of the position here taken is found in the subsequent action of the Legislature, at its extra session of 1921. By the Act passed by the Legislature at the Extra Session, 1921, hereinabove referred to, sub-section 6½ of Section 82 is taken entirely out of Section 82 and transposed to Section 78. And in sub-section 9, Section 82, the word "railroads" is reinserted, having been taken out in 1920, so as to exclude such corporations from the operation of the nine preceding sub-sections. But one logical reason for such amendment is apparent. The Legislature recognized the position we have been contending for herein, and realized that under any proper construction of Section 82, railroads were among those corporations entitled to the benefits of such subsection (3½). They wish to take this exemption from railroads, and in order to effectuate such intention, the act is amended by inserting "railroads" in 82 (9) and by taking sub-section 6½ out of 82 altogether, and putting in another section. The very change shows a

recognition and acknowledgment of the exemption afforded railroads by Section 82 (3½) and 82 (9) prior to such change. But for the existence of the exemption under the law, the amendment itself is meaningless, and without any apparent reason. This is, therefore, a construction by the Legislative body of its own act, and its construction is altogether in harmony with that which has been set forth in this argument.

Chadbourn S. D. & L. Co. v. Parker, 153 N. C. 130.

That the amendatory Act has no retrospective effect is hereinafter shown.

III.

AS A TAX FOR THE PRIVILEGE OF DOING BUSINESS THIS FRANCHISE TAX IS VOID AS BEING AN INTERFERENCE WITH AND A BURDEN UPON INTERSTATE COMMERCE, BECAUSE

(a) It taxes the privilege of engaging in interstate commerce;

(b) The receipts derived therefrom, and

(c) Is a tax on property located beyond the limits of the State.

(a) It taxes the privilege of engaging in interstate commerce and (b) the receipts derived therefrom.

We have already shown that the assessment as fixed by the Commissioner of Revenue is made up by finding the value of the physical property of this company at approximately $39,000,000 and then added an arbitrary amount of approximately $11,000,000 to make up the total assessment of $50,000,000, which is $11,000,000 of intangible property is nothing more nor less than the value of the

earnings of the company in interstate commerce. The rates from interstate commerce are included in this value. The valuable terminals and other property of complainant outside of the State of North Carolina were not deducted before the computation was made. Again the tax is not a tax which was included in the *ad valorem* assessment but is one which is made in addition to the tax upon the property. It attempts to tax the privilege of the railroad company for doing an intrastate and an interstate business in the State of North Carolina. It is not limited to intrastate business, but taxes the privilege of doing both. This franchise tax is measured, not by the amount of intrastate business done, nor yet by the value of the property in the State of North Carolina which is used in intrastate business, but by the value of the property assessed for *ad valorem* purposes, which latter value is made up of the tangible property within the State of North Carolina and of the intangible value, which latter is the value of the franchise as a going concern, used in interstate and intrastate business, and takes into consideration the value of the gross earnings derived from intrastate commerce.

The State of North Carolina cannot tax the privilege of doing an interstate business. The complainant is a corporation of the State of Virginia and no authority to do an interstate business has been conferred upon it by North Carolina.

In order that the State may tax the property of the company at its full value, as a going concern, the proportion in this State of its interstate business is the measure of the value of such property for State purposes and the State must take the whole scheme of *ad valorem* taxation of the company's property into account, and make the net income a part of it, and not make such net income tax an addition to such scheme of taxation.

In the *State Franchise Tax* case, 15 Wallace, 232, decided in 1872, there was involved a law of the State of Pennsylvania imposing a tax upon the transportation of freight into and out of the State of Pennsylvania. In that case the Court held that the tax was a regulation of interstate transportation and, therefore, a regulation of interstate commerce among the States, and that such imposition, whether large or small, was a restraint on the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines.

In *Fargo v. Michigan,* decided in 1886, 121 U. S. 230, the Court had under consideration a statute of Michigan which laid a tax of two and one-half per cent on the gross amount of their receipts for freight earned within the limits of the State from all persons and corporations running railroad cars within the State. The plaintiff Company was a corporation of New York and had no property in Michigan except rolling stock and office furniture. The Court held that this was clearly a direct regulation of interstate commerce in the light of all prior decisions beginning with the case of *Brown v. Maryland.*

In this case, the question of additional taxation by the State of Michigan was not involved, because the plaintiff company had practically no property in that State. The Court says:

> "But where the business so taxed is commerce itself, and is commerce among the States or with foreign Nations, the constitutional provisions can not thereby be evaded; nor can the States, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way."

Next there came before the Court the case of *Philadelphia & Southern Mail Steamship Company v. Commonwealth of Pennsylvania,* 122 U. S. 326, decided in 1887. In this case the Court had before it the validity of a Pennsylvania statute levying a tax of eight-tenths of one per cent upon all gross receipts from tolls and transportation, telegraph business or express business of corporations doing business in that State. The Steamship Company derived its receipts from freight and passengers moving between Philadelphia and Savannah in interstate commerce and in foreign trade from New Orleans, exclusively. The Supreme Court held that this was a regulation of interstate and foreign commerce, inconsistent with the commerce clause, and therefore, void. In this case the Court reviewed the cases of:

Robins v. Shelby Taxing District, 120 U. S. 489.
Brown v. Maryland, 125 U. S. 12.
State Franchise Tax Case and Case of State Tax on Railroad Gross Receipts, 15 Wallace 284.

and various other cases which had come before the Court at that time.

In this case the decision of the Gross Receipt Taxes was questioned, but not over-ruled.

In 1888 the Court decided the case of *Western Union Telegraph Company v. Massachusetts,* 125 U. S. 530. In this case certain laws of Massachusetts which imposed a tax upon the capital stock of the Telegraph Company, on account of the property, owned and used by it within that State, the amount of the tax being ascertained by comparing the length of the company's line in that State with the length of its entire line, was under consideration.

The main ground upon which the Telegraph Company

resisted the payment of the tax alleged to be due, was that it was in violation of the rights conferred on the company by Sections 5263 to 5369 of the Revised Statutes of the United States. These statutes gave the Telegraph Company the right to construct and maintain lines of telegraph through and over any portion of the public domain of the United States. The Telegraph Company contended that, as it had accepted the provisions of this section, it had conferred upon it the right to do the business of telegraphing without liability to taxation by a State and that it was a tax upon the franchise of the Company, and the franchise being derived from the United States could not be taxed by a State. The Court says:

> "But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the Corporation. The laws of that Commonwealth attempt to ascertain the just amount which any Corporation engaged in business within its limits shall pay as a contribution to the support of its government *upon the amount and value of the capital so employed by it therein.*"

The Court says further:

> "The tax in the present case, though nominally upon the shares of the capital stock of the Company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts; and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property."

In this case the tax was in fact in lieu of all other taxes although stress was not laid upon this point in the argument before the Court.

Following this case came the cases of:

Ratterman v. Western Union Telegraph Company, 127 U. S. 411,
Leloup v. Port of Mobile, 127 U. S. 640,
Western Union Telegraph Company v. Alabama, 132, U. S. 472.

In the *Ratterman* case, which was decided in 1887, the Court had before it the construction of a statute of the State of Ohio, levying a tax on the receipts of the Telegraph Company which were derived partly from interstate and partly from intrastate commerce. The case below was heard by a Circuit and a District Judge and the question was submitted to the Supreme Court as to whether a single tax assessed upon the receipts of the Telegraph Company, which receipts were partly derived from interstate commerce and partly from intrastate commerce, but which were returned and assessed in gross and without separation or apportionment, was wholly invalid, or invalid only in proportion to the extent that such receipts were derived from interstate commerce.

The Court held that the statute was not wholly invalid, but only invalid in proportion to the extent that such receipts were derived from interstate commerce.

In the *Leloup* case, decided in 1888, the Court held that the general license tax on a telegraph company affects its entire business interstate as well as domestic or internal and is unconstitutional.

In the case of *Western Union Telegraph Company v. Alabama*, 132 U. S. 472, the Court followed its decisions in the *Ratterman* and *Leloup* cases, the same question being presented.

In 1891 the case of *Maine v. Grand Trunk Railway Company*, 142 U. S. 217, was decided. There the Court held constitutional an annual excise tax levied upon all

railroads operated in the State for the privilege of exercising their franchises. The tax was fixed by percentages varying up to a certain limit upon the average gross receipts per mile, multiplied by the number of miles which were in the State when the road extended outside.

This decision, the opinion of which was rendered by Justice Field, was very unconvincing and has been consistently questioned, if not directly overruled. Four judges dissented.

Later, in the case of *Galveston, Harrisburg, etc. Railway Company v. Texas,* 210 U. S. 217, which will be referred to later, Mr. Justice Holmes, in referring to the *Maine* case, says:

> "This seems at first sight like a reaction from the *Philadelphia & Southern Mail Steamship Company* case, but it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern."

Mr. Justice Bradley, in his dissent, stated with great clearness, that constitutional limitations are upon this form of taxation, and his views in his dissenting opinion, expressed in the *Maine* case, were affirmed later on by unanimous consent in the opinion in the *Oklahoma* case, 223 U. S. 298, which will be commented upon later. He says:

> "Justices Harlan, Lamar, Brown and myself dissent from the judgment of the Court in this case. We do

so both on principle and authority. On principle because whilst the purpose of the law professes to be to lay a tax upon the foreign company for the privilege of exercising its franchise in the State of Maine, the mode of doing this is unconstitutional. The mode adopted is the laying of a tax on the gross receipts of the company, and these receipts of course, include receipts for interstate and international transportation between other States and Maine and between Canada and the United States."

After referring to many authorities, he says further:

"We think that the present decision is a departure from the line of these decisions. The tax, it is true, is called a tax on a franchise. It is so-called, but what is it in fact? It is a tax on the receipts of the company derived from international transportation."

In winding up his dissent, he says:

"If the interstate commerce of the country is not, or will not be, handicapped by this course of decision, I do not understand the ordinary principles which govern human conduct."

In *Postal Telegraph Company v. Adams,* 155 U. S. 688, decided in 1895, the Court held that a tax imposed by the laws of Mississippi when enforced against a telegraph company organized under the laws of another State and engaged in interstate commerce in Mississippi, being graduated according to the amount and value of the company's property, measured by miles within the State and being *in lieu of taxes directly levied on the property,* was a tax within the power of the State to impose and the exercise of that power did not amount to a regulation of interstate commerce.

The decision was delivered by Chief Justice Fuller, and in referring to the decision of the Supreme Court of Mississippi, below, says:

"And in the case at bar the Supreme Court in its examination of the liability of plaintiff in error for the taxes in question said: 'It will be thus seen at once that this is a tax imposed upon a telegraph company in lieu of all others, as a privilege tax, and its amount is graduated according to the amount and value of the property measured by miles. It is to be noticed *that it is in lieu of all other taxes, State, county, municipal.* The reasonableness of the imposition appears in the record, as shown by the second count of the declaration and its exhibits, whereby the appellant seems to be burdened in this way with a tax much less than that which would be produced if the property had been subjected to a single *ad valorem* tax.' This exposition of the statute brings it within the rule where *ad valorem* taxes are compounded or commuted for a just equivalent, determined by reference to the amount and value of the property. Being thus brought within the rule, the tax becomes substantially a mere tax on property and not one imposed on the privilege of doing interstate business. The substance and not the shadow determines the validity of the exercise of the power."

In *Western Union Telegraph Company v. Taggart*, 163 U. S. 1, decided in 1896, the Court had before it a statute of Indiana requiring the Telegraph Company to pay taxes upon its property within the State valued at such a proportion of the whole value of capital stock as the length of its line within the State bore to the total length of its lines everywhere, *deducting, however, a sum equal to the value of its real estate and machinery,* subject to local taxation in the State. The Court held that this statute was constitutional and valid, notwithstanding that nothing was in terms directed to be deducted from the value, either for the value of its franchise in the United States or for the value of its real estate and machinery situated and taxed in other States.

In explaining why this statute was held constitutional and valid, Mr. Justice Gray said, page 27:

> "While it takes, as the basis of valuation of the company's property within the State, the proportion of the value of its whole capital stock which the length of its lines within the State bears to the whole length of all its lines, it makes it the duty of the State Board of Tax Commissioners, to make such deductions, on account of a greater proportional value of the Company's property outside the State, or for any other reason, so as to assess its property within the State at its true cash value only."

Here by way of parenthesis, it becomes pertinent to call the Court's attention to the fact *that neither the State Tax Commission of North Carolina nor the Commissioner of Revenue in making the assessment of railroads, made any such deductions as was its duty to do.*

In *Adams Express Company v. Ohio State Auditor,* 165 U. S. 194, decided by the Supreme Court in 1897, the opinion being written by Mr. Chief Justice Fuller, the Court upheld the Ohio statute which required the Board of Assessors to assess and ascertain the value of the property of express, telegraph and telephone companies and in determining the value of the property of such companies in that State to be taxed within the State and assessed as provided in the statute, the Board should be guided by the value of the property as determined by the entire capital stock of the companies and such other evidence and rules as will enable the Board to arrive at the true value in money of the entire properties of the companies within the State in the proportion which the same bore to the entire property of the companies as determined by the value of the capital stock, property, and other evidence and rules as aforesaid.

In this case there was a vigorous dissenting opinion

written by Mr. Justice White, and concurred in by Justices Field, Harlan, and Brown.

The Court says, at page 226:—

> "Assuming the proportion of capital employed in each of the several States through which such a company conducts its operations has been fairly ascertained, while taxation thereon, or determined with reference thereto, may be said in some sense to fall on the business of the company, it is only indirectly. The taxation is essentially a property tax, and, as such, not an interference with interstate commerce."

In his dissenting opinion, Mr. Justice White says:

> "It is elementary that the taxing power of one government cannot be lawfully exerted over property not within its jurisdiction or territory and within the territory and jurisdiction of another. The attempted exercise of such power would be a clear usurpation of authority, and involve a denial of the most obvious conceptions of government. This rule common to all jurisdictions, is peculiarly applicable to the several states of the union, as they are by the Constitution confined within the orbit of their lawful authority, which they cannot transcend without destroying the legitimate powers of each other, and therefore without violating the Constitution of the United States."

The next important case was *Fargo v. Hart*, decided March 21, 1904, 193 U. S. 490. In this case the State of Indiana attempted in assessing the property of the American Express Company, to include in the assessment property situated outside of the State of Indiana, among other property being about $15,500,000 personal property in New York, $3,000,000 in real estate and other property outside of Indiana. The State Board of Tax Commissioners undertook to tax property of the company by treating the whole business as a unit and assessing the company on a proportion of the total value of its property, determined by

the ratio of the mileage in Indiana to the total mileage of the company, excluding its ocean mileage for foreign express business. The company made a return to the Board setting forth in detail what the property was, where situated, how used, and that the value and nature of the property was not disputed, and contended that when these facts were shown the Board was not at liberty to spread the whole value over the whole line equally, and tax by mileage. The decision in this case is written by Mr. Justice Holmes, who afterwards wrote the opinion in the case of *Galveston, Harrisburg, etc., Railway Co., v. Texas.*

The Courts says:

> "The general principles to be applied are settled. A State cannot tax the privilege of carrying on commerce among the States. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the States. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the State, in taxing, even though the other parts of the system are outside of the State. The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line, in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the State to the whole system. * * * And this principle, established by many cases, has been ex-

tended by the cases first cited above to the lines of express companies, although those lines are not material lines upon the face of the earth. There is the same organic connection as in the other cases."

However, in 1908, the case of *Galveston, Harrisburg, etc., Railway Company v. Texas,* 210 U. S. 217, came before the Supreme Court of the United States, involving the validity of a Texas statute imposing a tax upon railroads and other corporations owning or controlling any line of railroad within that State, equal to one-tenth of one per cent (and repealing the existing tax law), on gross passenger earnings of railroads. Section 1 of this statute imposes—

> "an annual tax for the year 1905, and for each calendar year thereafter equal to one per centum of its gross receipts, if such line of railroad lies wholly within the State."

and in Section 2 requires a report under oath of—

> "the gross receipts of such line of railroad from every source whatever, for the year ending on the 30th day of June last preceding. * * *
> and immediate payment of the tax, 'calculated on the gross receipts so reported.' "

The lines of railroad of the plaintiff lay wholly within the State of Texas but they connected with other lines and a part, and in some instances the larger part, of the gross receipts was derived from the carriage of passengers and freight in interstate commerce. In the opinion of the Court Mr. Justice Holmes referred to the prior cases, including the case of *Maine v. Grand Trunk, Philadelphia & Southern Mail Steamship Company v. Pennsylvania, Adams Express Company v. Ohio State Auditor, Pullman Company v. Pennsylvania,* and the other cases of like nature involving the construction of taxes upon railroads and public

service corporations, and in commenting upon the case of *Maine v. Grand Trunk Railroad,* he says:

> "In *Maine v. Grand Trunk R. Co., supra,* 'an annual excise tax for the privilege of exercising its franchise' was levied upon every one operating a railroad in the State, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the State, when the road extended outside. This seems at first sight like a reaction from the *Philadelphia & Southern Mail Steamship Company* case. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the State was to reach that value, and not to fasten on the receipts from transportation as such, was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its land and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. *The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern.* That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax." (Italics ours.)

Further he says—

> "By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon the property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the constitution . . . . . The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed

to tax the property, and to tax it at its actual value as a going concern. On the other hand, the State can not tax the interstate business. The two necessities hardly admit of an absolutely logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt or to effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A *practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this Court as best it can. Neither the State Courts nor the legislature, by giving a tax a particular name or by the use of some form of words can take away our duty to consider its nature and effect.* If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. *Stockard v. Morgan,* 185 U. S. 27, 37, 46 L Ed 785, 794, 22 Sup. Ct. Rep. 576; *Asbel v. Kansas,* 209 U. S. 251, 254, 256, ante, 778, 780, 781, 28 Sup. Ct. Rep. 485.

"We are of the opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States. The distinction between a tax 'equal to' 1 per cent of gross receipts, and a tax of 1 per cent of the same, seems to us nothing except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. *On the contrary we rather infer from the judgment of the State Court and from the argument on behalf of the State that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts not even disguised by the name of an occupation tax and in no way helped by the words 'equal to.'*" (Italics ours.)

The following propositions are laid down in this case:

1st. The State may tax the property of an interstate corporation and tax it at its actual value as a going concern.

2nd. But it can not tax the interstate business.

3rd. That in determining whether the tax is void the whole scheme of taxation must be taken into account.

4th. That neither the State Court nor the legislature, by giving a tax a particular name or by use of some form of words, can take away the duty of the Court to consider its nature and effect.

5th. That if it bears upon commerce between the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form.

6th. That the Supreme Court of the United States, in deciding the case of *Maine v. Grand Trunk Railway,* decided, in upholding the statute in that case, that the estimated gross receipts per mile were the measure of the value of the property, and that the effort of the State was to reach that value, and not fasten on the receipts from transportation in the State and that this was shown in the scheme of the statute to establish the assessment.

In the case of *Western Union Telegraph Company v. Kansas,* 216 U. S. 1, and the case of *Pullman Company v. Kansas,* 216 U. S. 56, the Supreme Court declared invalid under the Commerce and Due Process Clauses of the Federal Constitution, as necessarily amounting to a burden and tax on interstate commerce, and property located or used outside of the State, the statute of Kansas imposing a charter fee of a given percentage upon the entire authorized capital stock of foreign corporations as a condition of their continuing to do local business.

On page 26, Mr. Justice Harlan, in writing the opinion of the Court says:

> "We are aware of no decision by this Court holding that a State may by any device or in any way, whether by a license tax in the form of a 'fee,' or otherwise, burden the interstate business of a corporation of another State, although the State may tax the corporation's property regularly or permanently located within its limits, where the ascertainment of the amount assessed is made 'dependent' *in fact* on the value of its property *situated within the State.*"

Following this case was the case of *Ludwig v. Western Union Telegraph Company,* 216 U. S. 146, in which the Court reviewed the statute of the State of Arkansas requiring foreign corporations to pay a tax based on their capital stock which represented its property and business everywhere inside and outside of the State. That opinion was also written by Justice Harlan, and the statute was declared illegal and the State enjoined from enforcing it.

In 1911 the Court decided the case of *Flint v. Stone Tracy Company,* 220 U. S. 107, involving the validity of the Act of Congress known as the Corporation Tax Law. The Court again approved its holding in the *Galveston* case and *Kansas* case, and while upholding the validity of the tax, specifically stated that there was nothing in this case contrary to the ruling in those. The Court says:

> "That the standard of measure of a tax is not *per se* conclusive either of its validity or invalidity and holds that the distinction lies between the attempt to tax the property as such and to measure the legitimate taxes upon the privileges involved in the use of the property."

In 1912 the Court decided the case of *Meyer, Auditor of the State of Oklahoma v. Wells Fargo Company,* 223

U. S. 298. In that case it reviewed a statute of Oklahoma *levying a gross revenue tax* upon corporations *in addition* to the taxes levied and collected upon *ad valorem basis upon property and assets of such corporation* equal, in the case of a public service corporation operating within and partly without the State, to such per cent of its gross receipts as the portion of its business done within the State bore to the whole of its business, with a proviso for fixing a different proportion, if the same clearly represented the proportion which the gross receipts of any such public service corporation for any year within the State bore to its gross receipts. The Court says:

> "The plaintiff's receipts are largely from commerce among the States, and it also receives large sums as income from investments in bonds and land all outside of the State of Oklahoma. So that it is evident that if the tax is what it calls itself it is bad on the former ground, and that whatever it is it is bad on the latter. *Fargo v. Hart,* 193 U. S. 490. In that case the tax was proportioned to mileage and it was held that it could not be sustained when, although purporting to be a tax on property, it took into account, in order to increase proportionately the value of the mileage within the State, valuable property outside of it. The same principle would apply to a property tax measuring the total property by the total gross receipts increased by the special outside sources of income and taxing a proportion of this total fixed by the ratio of business within the State to that outside. But we see no warrant for calling the tax a property tax. It is so similar to the Texas statute held bad in *Galveston, Harrisburg & San Antonio Railway Company v. Texas,* 210 U. S. 217, as to show that, if one is not copied from the other, they have a common source. It would be

possible only by some extraordinary turn of ingenuity to sustain this after condemning that.

"It was argued in some detail that taking into account the rest of the act and other statutes passed later at the same session this really was a property tax. But the scope and purport of the act, so far as it affects express companies, are too obvious to admit such a view. The tax is 'in addition to the taxes levied and collected upon an *ad valorem* basis.' Even if we read the words which follow without a comma, viz.: 'upon the property and assets of such corporation,' as not qualifying those which immediately precede but as attempting to characterize the 'gross revenue tax' as a tax on such property and assets, nevertheless all the property and assets are the subject of the *ad valorem* taxes referred to. *Therefore this tax can not be an attempt to reach the value of what is by the law to be valued and taxed in a different way. It would be difficult to apply to a tax levied in these days the explanation of Maine v. Grand Trunk Ry. Co., 142 U. S. 217, given in Galveston, Harrisburg & San Antonio Ry. Co., v. Texas, 210 U. S. 217, 226, Flint v. Stone Tracy Co., 220 U. S. 107, 162-165, and to suppose it intended to reach only the additional value given by its being part of a going concern to property already taxed in its separate items. There is nothing sufficient to indicate such a limitation, and for the reasons given above on the authority of Fargo v. Hart, 193 U. S. 490, it is plain that the gross receipts from all sources could not have been used as a means for estimating the going value of the property in the State. We may add in this connection that this same requirement as to the total gross receipts shows that it is impossible to save the constitutionality of the act by construing it as referring only to the receipts from commerce wholly within the State.*" Pp. 299, 301. (Italics ours.)

In the *Galveston* case the Chief Justice and Justices Harlan, White and McKenna dissented. That decision was written in 1908, and it is significant that four years later in the *Oklahoma* case there was not a single dissent expressed by any member of the Court, the opinion in that case being by Mr. Justice Holmes, who wrote the opinion in the *Galveston* case, and the Court comes back to principles announced by Mr. Justice Bradley in his dissenting opinion in the *Maine* case.

At the same term of Court at which the *Oklahoma* case was decided the Court decided the case of *United States Express Company v. Minnesota,* 223 U. S. 335, and upheld the statute of the State of Minnesota which taxed express companies on property employed within said State at six per cent of the gross receipts proportioned, according to mileage, but the Court upheld this statute *because this tax was in lieu of all other taxes and therefore it was an exercise in good faith of the taxation power, and not an unconstitutional burden upon interstate commerce.*

Note the distinction which the Court makes between this case and the *Galveston* and *Oklahoma* cases. The Court said:

> "Appreciating the difficulty emphasized in the *Galveston* case of drawing the line between taxes that burden interstate commerce and those whereby the Legislature is simply undertaking to impose a property tax within its legitimate power, measured in part by the income from interstate commerce transactions, how does the present case stand? The Supreme Court of Minnesota construed the tax to be a property tax, measured by the gross earnings within the State, which, under their construction of the tax, included the earnings herein questioned. That Court held that the statute was part of a system long in force in Minnesota, passed under the authority of the State Constitution, and was intended to afford a means of

valuing the property of express companies within the State. While the determination that the tax is a property tax measured by gross receipts is not binding upon this Court, we are not prepared to say that this conclusion is not well founded, in view of the provisions and purposes of the law.

"The statute itself provides that the assessments under it 'shall be in lieu of all taxes upon its property.' In other words that is the only mode prescribed in Minnesota for exercising the recognized authority of the State to tax the property of express companies as going concerns within its jurisdiction. If not taxed by this method the property is not taxed at all.

"The tax in the present case is not like those held invalid in the Galveston case and the Oklahoma case, being in addition to other State taxation reaching the property of all kinds of the express company. The tax to be collected in part from the earnings of interstate commerce was part of a scheme of taxation seeking to reach the value of the property of such companies in the State, measured by the receipts from business done within the State. The statute was not aimed exclusively at the avails of interstate commerce (*Philadelphia & S. Mail S. S. Co. v. Pennsylvania, supra*), but, as in the *Maine* case, was an attempt to measure the amount of tax within the admitted power of the State by income derived, in part, from the conduct of interstate commerce. The property of express companies, being much of it an intangible character, is difficult to reach and properly assess for taxation. This difficulty led this Court in *Adams Express Co. v. Ohio State Auditor,* 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Reps. 305 S. E., 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Reps. 604, to sustain a tax upon the property of an express company, which property was considered a part of one money-earning organization extending through many States."

(Italics ours.)

In the *Minnesota* case, the Minnesota Court had declared

this statute was part of a system long in force in Minnesota and was intended to afford a means of valuing property of express companies within that State. In North Carolina no such system of taxation has ever grown up. The taxes in North Carolina have, since the Constitution of the State, been levied on property of all persons alike, but the Legislature of North Carolina has attempted to adopt a new scheme of taxation in violation of the Constitution of North Carolina. It attempts to levy taxes on railroad corporations which are not levied upon any other class of property, and the statutes have no virtue as being classification statutes. These taxes are not in lieu of *ad valorem* taxes levied against the property of railroads in North Carolina.

In the case of *Baltic Mining Company v. Massachusetts,* 231 U. S. 68, decided in 1913, the Supreme Court declared constitutional an excise tax imposed by the State of Massachusetts upon a certain class of corporations measured by the authorized capital stock of such corporations, but in this case the Court distinguished and upheld, particularly, the *Galveston, Western Union, Pullman* and *Oklahoma* cases, on the ground that by the facts in those cases there had been no attempt to separate the interstate business from the intrastate business, while in the *Baltic Mining Company* case such an attempt has been successfully made. The taxes in the *Baltic* case were held valid as applied to corporations which were engaged in carrying on business *not itself interstate commerce* though their products were sold and shipped in interstate commerce and which are carrying on purely domestic and local business quite separate from their interstate transactions.

In distinguishing this case from the *Galveston* and other cases, the Court said:

"There was no attempt to separate the interstate from

the intrastate business by the limitation of State lines in this prosecution."

Next the Court had before it the *Ohio Tax* cases, 232 U. S. 576, decided in 1914. In that case the Court reviewed the Ohio statutes imposing an excise tax of four per cent on gross interstate earnings of railroad companies from business done within the State, "excluding therefrom all earnings derived wholly from interstate business or business done for the Federal Government."

In upholding this statute the Court said (pages 591-593):

> "It is said that the present act is a re-enactment, without material change so far as present purposes are concerned, of an act of March 10, 1910; that prior to the latter act a law known as the Cole Law was in force, under which each railroad was compelled to pay a tax equal to one per centum of its entire gross earnings, 'computed by multiplying the average gross earnings per mile over the entire system, by the number of miles in Ohio; that this act was obnoxious to the 'commerce clause' of the Federal Constitution, for the reasons that entered into the decision of this Court in *Galveston, Harrisburg, etc., Railway Co. v. Texas*, 210 U. S. 217; that after the decision of this case in May, 1908, it was anticipated that the Cole Law would probably be held unconstitutional (as it has since been held by an inferior State Court in Ohio), and so the Legislature contrived the Act of March 10, 1910, for the purpose of imposing a tax upon the railroads as heavy as that imposed by the Cole Law, while avoiding the form of that enactment; and that for this reason the act of March 10, 1910, increased the percentages in accordance with which the taxes were to be severally determined as follows: Railroads and pipe line companies, from 1 to 4 per cent; express and telegraph companies, from 1 to 2 per cent; all other utilities, from 1 to 1-1/5 per cent, but that instead of taking all the gross earnings, the new percentages were to be applied only to intrastate earnings. It is contended that the increase

in the percentages as to railroad and pipe line companies was due to the fact that it was conceived that about three-fourths of their business was interstate, and that therefore a tax of 4 per cent, on the intrastate earnings would be about equal to a tax of 1 per cent, on the total; in other words, that the tax rate was increased fourfold because such utilities were engaged in interstate commerce.

"The tax is, however, in substance as well as in form, an excise or privilege tax. Its reasonableness, unless some Federal right be violated, is within the discretion of the State Legislature. We have seen that the classification adopted cannot be deemed illusory; that is, there is no apparent violation of the equality provisions of the State Constitution or of the equal 'protection clause' the State of the Fourteenth Amendment, although railroad and pipe line companies are required to pay at the rate of four per cent of the annual intrastate earnings, while other public service corporations pay a less percentage. It is, of course, entirely settled that a State cannot, consistently with the Federal control of interstate commerce, lay such taxes, either upon property rights or upon franchises or privileges, as in effect to burden such commerce. But the line is not always easily drawn, as recent cases sufficiently show. *Galveston, Harrisburg, etc., Ry. Co. v. Texas,* 210 U. S. 217, 225, 229; *United States Express Co. v. Minnesota,* 223 U. S. 335, 344; *Williams v. Talladega,* 226 U. S. 404, 416; *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68, 82.

"The present act does not on its face manifest a purpose to interfere with interstate commerce, and we are unable to accept the historical facts alluded to as sufficient evidence of a sinister purpose, such as would justify this Court in striking down the law. We could not do this without in effect denouncing the Legislature of the State as guilty of a conscious attempt to evade the obligations of the Federal Constitution. Assuming the law was changed in 1910, because of a fear that the Cole Law would be held unconstitutional, the

mere fact that, while excluding interstate earnings from the multiplicand, the multiplier was increased, is not of itself deemed sufficient evidence of an unlawful effort to burden a privilege that is not a proper subject of State taxation."

In the case of *Singer Sewing Machine Company v. Brickell,* 233 U. S. 304, decided in 1914, the Court had before it the validity of an Alabama statute, levying a tax of $50.00 annually against each corporation, etc., selling or delivering sewing machines for each county in which said articles were sold or delivered, and for each wagon or team used for delivering same an additional sum of $25.00; with a tax equal to fifty per cent of the above for county purposes. The Singer Sewing Machine Company was a corporation of the State of New Jersey and brought its bill to enjoin the collection and enforcement of the taxes.

The Court in holding the tax constitutional, after referring to the cases of *Leloup v. Mobile,* the *Galveston, Kansas, Oklahoma,* and other like cases, and upholding those cases said:

> "The statute now under consideration differs materially, in that it deals separately with the business as conducted in each county of the State, and provides for separate taxes to be laid for each county. And the facts as averred in the bill of complainant show that with respect to all of the counties in which appellant does business, excepting only the County of Russell, there is no element of interstate commerce."
>
> "It would be going altogether too far to say that appellant, being properly taxable, and with out the least interference with interstate commerce, in twenty-nine counties of the State could obtain immunity from all such taxation by establishing in one county a system of business that involved transactions in interstate commerce."

In *Choctaw & Gulf Railroad Company v. Harrison,* 235

U. S. 292, also decided in 1914, the Court had before it the construction of a statute of Oklahoma imposing upon coal mining companies or producers a tax upon the gross sales of coal dug from mines belonging to the Choctaw and Chickasaw Indians which was leased and operated by the railroad company. The contention was that that Oklahoma statute provided for gross revenue taxes and this was resisted upon the ground that in reality the demand was for an occupation or privilege tax to which the railroad company could not be lawfully subjected, because as a Federal instrumentality, acting on Congressional authority, it had leased and was operating the mines to which the Indians held title.

The Court said:

> "From the foregoing it seems manifest that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is being carried into effect. Such an agency cannot be subjected to an occupation or privilege tax by a State. *McCullough v. Maryland,* 4 Wheat, 316-425; *Farmers' Bank v. Minnesota,* 232 U. S. 516. But it is insisted that the statute rightly understood prescribed only an *ad valorem imposition* on the personal property owned by appellant—the coal at the pit's mouth —which is permissible according to many opinions of the Court. *Thomson v. Pacific Railroad,* 9 Wall. 579; *Union Pacific Railroad v. Peniston,* 18 Wall. 5; *Central Pacific Railroad v. California,* 162 U. S. 91; *Thomas v. Gay,* 169 U. S. 264.
>
> "The Court below held that the effect of the Act was to lay a valid tax on personalty and the same result was subsequently reached by the Supreme Court of Oklahoma. *McAlester-Edwards Coal Co. v. Trapp* 38 Oklahoma, 792-794. The United States District Court for the Western District of Oklahoma arrived at a different conclusion. *Missouri, Kansas and Texas Railway v. Meyer,* 204 Federal Rep. 140.

"Neither State Courts nor Legislatures by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect. Galveston, Harrisburg & San Antonio Ry. v. Texas, 210 U. S. 217-227.

"It is unnecessary to consider the power of the State of Oklahoma to treat coal dug from mines operated by the appellant as other personalty and to subject them to a uniform *ad valorem* tax; for it seems to us clear that the Act of 1908 provided for no such imposition. *Its very language imposes a 'gross revenue tax which shall be in addition to the taxes levied and collected upon an ad valorem basis.' We cannot therefore, conclude that the gross receipts were intended merely to represent the measure of the value of property liable to a general assessment * * * Provision is made for determining that upon a different basis. Oklahoma v. Wells Fargo & Company,* 223 U. S. 298, 301. The requirement is not on account of property owned on a given day, as is the general custom where *ad valorem* taxes are provided for and as the Oklahoma laws require; but the manifest purpose is to reach all sales and secure a certain percentage thereof —a method commonly pursued in respect of license and occupation taxes. *Pullman Company v. Knott, ante,* p. 23.

"A tax upon a merchant's, manufacturer's, or miner's gross sales is not the same thing as one on his stock treated as property. Cooley on Taxation (3rd Ed.), p. 1095. The former is upon his business. In effect, the Oklahoma act prescribes an occupation tax (*Ohio Tax* cases, 232 U. S. 576, 592); and, accepting as true, the allegations of appellant's bill, we think it cannot lawfully be subjected thereto." (Italics ours.)

This tax *was in addition to the taxes levied and collected upon an ad valorem basis upon mining property.*

In December, 1914, the case of *St. Louis Southwestern Railroad v. Arkansas,* 235 U. S. 350, was decided. In that

case the Court had under consideration the validity of an Act of Arkansas requiring foreign corporations doing business in that State and owning and using a part or all of its plant in the State, to pay for the privilege of exercising its franchise in that State, a tax of one-twentieth of one per cent each year upon the proportion of the outstanding capital stock of the corporation represented by the property owned and used in the business transacted in that State.

This was the provision of Act No. 112 and the other Act before the Court was No. 251, providing that franchises (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies, are declared to be property for the purpose of taxation and the value of their franchises are to be considered by the assessing officers when assessing the property of such corporations. The Supreme Court of Arkansas decided that the tax in the case of foreign corporations was paid upon the privilege of evercising their corporate powers within the State and that the act was valid. The Supreme Court, in an opinion by Mr. Justice Pitney, says:

> "Upon the mere question of construction we are of course concluded by the decision of the State Court of last resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast nor upon the characterization of that scheme as adopted by the State Court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

The Court still cites with approval the *Galveston, Kansas* and other like cases. The Court accepted the construction placed upon Act No. 112 by the Arkansas Court, that it

imposed a franchise tax upon the right to exist as a corporation or to exercise corporate powers within the State, the amount of the tax being fixed solely by reference to the property of the corporation that is within the State and used in the business transacted in the State, and excluded any imposition upon or, interference with, interstate commerce.

Further the Court says:

> "The tax, as will be observed, is not in any wise based upon the receipts of the railroad company, from interstate commerce either taken alone or in connection with receipts from its intrastate business. Since, therefore, the amount of the imposition is not made to fluctuate with the volume or the value of the business done we are relieved from those difficulties that arise where State taxes are based upon the earnings of interstate carriers."

In 1917 the Court decided the case of *Looney v. Crane*, 245 U. S. 178. There the question before the Court was the constitutionality of a statute of the State of Texas requiring foreign corporations doing business in that State to pay a permit tax based upon the capital stock and a franchise tax based upon the capital stock, surplus and undivided profits. The Court held this statute unconstitutional, the opinion being delivered by Mr. Chief Justice White, and there being no dissenting opinion. In this case the Chief Justice with his usual clearness presents an elaborate argument showing the difference between that class of cases under which are the *Kansas, Oklahoma, Ludwig* and *Galveston* cases, on the one hand, and the *Baltic Mining Company, St. Louis Southwestern Railroad v. Arkansas,* and that class of cases, on the other hand. He particularly lays stress upon the fact that the latter in no particular overruled the former, but were expressly again approved.

As the exposition of the law is so clearly and succinctly set out in that case, we take the liberty of quoting at length from this opinion:

> "It may not be doubted under the case stated that, intrinsically and inherently considered, both the permit tax and the tax denominated as a franchise tax were direct burdens on interstate commerce, and, moreover, exerted the taxing authority of the State over property and rights which were wholly beyond the confines of the State, and not subject to its jurisdiction, and therefore constituted a taking without due process. It is also clear, however, that both the permit tax and the franchise tax exerted a power which the State undoubtedly possessed; that is, the authority to control the doing of business within the State by a foreign corporation and the right to tax the intrastate business of such corporation, carried on as the result of permission to come in. The sole contention, then, upon which the acts can be sustained, is that although they exerted a power which could not be called into play consistently with the Constitution of the United States, they were yet valid because they also exercised an intrinsically local power. But this view can only be sustained upon the assumption that the limitations of the Constitution of the United States are not paramount, but are subordinate to and may be set aside by State authority as the result of the exertion of a local power. In substance, therefore, the proposition must rest upon the theory that our dual system of government has no existence because the exertion of the lawful powers of the one involves the negation or destruction of the rightful authority of the other. But original discussion is unnecessary, since to state the proposition is to demonstrate its want of foundation and because the fundamental error upon which it rests has been conclusively established. Indeed, the cases referred to were concerned in various forms with the identical questions here involved, and authoritatively settled that the

States are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the State, in violation of the Constitution, or, because of the right to exclude, to exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the State, in disregard, not only of the commerce clause, but of the due process clause of the 14th Amendment. *Western U. Tel. Co. v. Kansas,* 216 U. S. 154, L. ed. 355, 30 Sup. Ct. Rpts. 190; *Pullman Company v. Kansas,* 216 U. S. 56, 54, L. ed. 378, 30 Sup Ct. Rpts. 232; *Ludwig v. Western U. Tel. Co.,* 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rpts. 280; *International Text Book Company v. Pigg,* 217 U. S. 91, 54 L. ed. 678, 27 LRA (NS) 493, 30 Sup. Ct. Rpts. 481, 18 Ann. cases 1103; *Atchison T. & S. F. R. R. v. O'Connor,* 223 U. S. 280, 283, 56 L. ed. 436, 32 Sup. Ct. Rpts. 216, Ann. cases 1913C, 1050.

"The dominancy of these adjudications is plainly shown by the fact that, as the result of the decision in the leading case (*Western U. Tel. Co. v. Kansas, supra*), the Supreme Court of the State of Texas, recognizing the repugnancy of the Permit Tax Law here in question to the Constitution of the United States, enjoined its enforcement. (*Western U. Tel. Co. v. State,* 103 Tex. 306, 126 SW 1197), and following that ruling the Legislature of the State has amended both the Permit Tax Law and the Franchise Tax Law now before us, presumably in an effort to cure the demonstrated repugnancy of the statutes, before amendment, to the Constitution of the United States. Of course whether the amendments as adopted accomplished the purpose intended is a matter which we are not called upon to consider and as to which we express no opinion.

"But, despite the controlling decisions dealing with cases in substance identical in fact and principle with the case here presented, and the effect

given to them in Texas as to one of the statutes here involved, it is now insisted that the statutes are not repugnant to the Constitution of the United States, and that error was committed in deciding to the contrary. This is rested on cases decided since those to which we have referred. *Baltic Mining Co. v. Mass.*, 231 U. S. 68, 58 L. ed. 127, 34 Sup. Ct. Rep. 15; *St. L. Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 59 L. ed. 265; 35 Sup. Ct. Rep. 99; *Kansas City, Ft. S. & M. R. Co. v. Botkin*, 240 U. S. 227, 69 L. ed. 617, 36 Sup. Ct. Rep. 261; *Kansas City M. & B. R. Co. v. Stiles*, 242 U. S. 111, 61 L. ed. 176; 37 Sup. Ct. Rep. 58. The proposition is, therefore, that these cases overruled the previous decisions. The incongruity of the contention will be manifest when it is observed that not only did the cases relied upon contain nothing expressly purporting to overrule the previous cases, but, on the contrary, in explicit terms declared that they did not conflict with them, and that they proceeded upon conditions peculiar to the particular cases.

"The demonstration of error in the argument which results from this situation might well cause us to go no further in its consideration. In view, however, of the gravity of the subject to which the argument relates and the misconception and resulting confusion in doctrine which might result from silence, we briefly notice it. In the first place it is apparent in each of the cases that, as the statutes under consideration were found not to be on their face inherently repugnant either to the commerce or due process clause of the Constitution, it came to be considered whether, by their necessary operation and effect, they were repugnant to the Constitution in the particulars stated, and this inquiry, it was expressly pointed out was to be governed by the rule long ago announced in *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 698, 39 L. Ed. 311, 316; 5

> Interstate Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360, that 'the substance, and not the shadow, determines the validity of the exercise of the power.' In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the Constitution which was found to exist resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily their effect as to lead to such result. These conditions related to the subject-matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied. It is thus manifest on the face of all the cases that they in no way sustained the assumption that, because a violation of the Constitution was not a large one, it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution.
>
> It follows, therefore, that the cases which the argument relies upon do not in any manner qualify the general principles expounded in the previous cases upon which we have rested our conclusions, since the latter cases rested upon particular provisions in each particular case, which, it was held, caused the general and recognized rule not to be applicable."

Following this the Court decided the case of *International Paper Company v. Massachusetts,* 246 U. S. 135, in March, 1918. The Court reversed the decision of the State Judicial Court of Massachusetts dismissing the petition of a foreign corporation to recover back the amount of excise tax as a condition of doing business in that State. The plaintiff was a New York corporation. There

were two statutes under consideration; one an act of 1909 requiring that every corporation at the time of filing its annual certificate of condition each year to pay an excise tax to be assessed by the Tax Commissioner of 1-50 of 1 per cent of the par value of its authorized capital stock as stated in the annual certificate of condition not exceeding two thousand dollars, and the statute of 1914 imposing upon every foreign corporation subject to the Statute of 1909 at the time of filing its annual certificate of condition, in addition to the tax levied by the act of 1909, to pay an excise tax to be assessed by the Tax Commissioner of 1-100 of 1 per cent of the par value of its authorized capital stock in excess of ten million dollars. The capital stock of the plaintiff company was $45,000,000. Its total assets were not less than $39,-000,000 or $40,000,000 of which not less than 1¾ per cent were located or invested in Massachusetts. Again, in this case there were no dissents. The Court refers to the *Kansas* and *Ludwig* cases and the case of *Pullman Company v. Kansas, supra,* and upholds these cases laying down six (6) propositions. Among others, that the State consistently with the due process clause of the Constitution cannot tax the property belonging to a foreign corporation and neither located nor used within the confines of the State, nor could it regulate directly or indirectly interstate commerce, and that the Court would look to the essential and practical features of the statute rather than its form or local characterization. The Court said:

> "But the immunity of interstate commerce from state taxation is not confined to what is done by the carriers in such commerce. On the contrary, it is universal and covers every class of interstate commerce, including that conducted by merchants and trading companies. And as respects the power of a

state to tax property beyond its jurisdiction belonging to a foreign corporation, it is of no moment whether the corporation be a carrier or a trading company, for a state is wholly without power to impose such a tax."

The Court then refers to the case of *Looney v. Crane*, just above cited, and to its decision in that case. Referring to the case of the *Western Union Telegraph Company v. Kansas* and then to the line of cases beginning with *Baltic Mining Company v. Massachusetts*, and ending with *Kansas City, M. & B. R. R. Co. v. Stiles*, the Court again quotes from the *Looney* case with approval, following which the Court says:

> "That case" (the Looney case) "and those which it followed and reaffirmed are fully decisive of this. The statutes then and now in question differ only in immaterial details, and the circumstances of their application or attempted application are essentially the same. In principle the cases are not distinguishable."

The Court held that the Massachusetts statutes were unconstitutional as placing a prohibited burden on interstate commerce and as being laid on property of foreign corporations located and used beyond the jurisdiction of the State.

In summarizing the law as already declared the Court lays down the following propositions:

> "1. The power of a State to regulate the transaction of a local business within its borders by a foreign corporation—meaning a corporation of a sister State—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on State action.
>
> "2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a State statute which either directly or by its necessary operation burdens such commerce is invalid,

regardless of the purpose with which it was enacted.

"3. Consistently with the Due Process Clause, a State can not tax property belonging to a foreign corporation and neither located nor used within the confines of the State.

"4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a State in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the State can not require the corporation, as a condition of the right to do a local business therein, to submit to a tax on its interstate business or on its property outside the State.

"5. A license fee or excise of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business in several States, although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other States; and this because the capital stock of the corporation represents all its business of every class and all its property, wherever located.

"6. When tested, as it must be, by the substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the State."

After this the Court decided the case of *Union Tank Line v. Wright,* on March 29th, 1919, 249 U.S. 275, holding a statute of Georgia which made the ratio that the miles of railway in that State over which moved oil tank cars of

foreign equipment companies (not carrying on business in the State and not having any office there) bore to the total mileage so traversed by these cars in all of the States, the sole basis of assessment for State taxation of the property of such corporation, as a method so arbitrary and produced results so unreasonable as to enforce the tax, will take the property without due process of law and unduly burden interstate commerce, where the valuation thus arrived at is nearly $300,000 and the value of the average number of tank cars within the State during the year, the only property of the corporation in the State, is less than $50,000. The opinion was written by Mr. Justice McReynolds, and he says, page 282:

> "A State may not tax property belonging to a foreign corporation which has never come within its borders,—to do so under any formula would violate the Due Process Clause of the 14th Amendment. . . . . But if the plan pursued is arbitrary and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause of the 14th Amendment or both."

Then in the case of *Wallace v. Hines,* 253 U.S. 66, decided May 3rd, 1920, the Supreme Court of the United States was called upon to review a decree of the United States District Court for the District of North Dakota enjoining the enforcement of State taxes on foreign interstate railroad companies. This case is very similar to the case at bar. The tax there was made and laid upon all of the property of the railroad company in the State, put a cloud upon their title, delay in payment was visited with large penalties and the Court held that therefore there was no adequate remedy at law and proceeded to the question of the illegality of the tax. The statute levied a tax only on corporations of fifty cents for each $1,000.00 actually in-

vested in the transaction of business in the State; provided, that in the case of corporations engaged in business partly within and partly without the State, the investment in the State shall be held to mean that proportion of its entire stock and bond issues which its business within the State bears to its total business within and without the State, and where such business within the State is not otherwise more easily and certainly separable from its entire business within and without the State, the business within the State shall be held to mean such proportion of the entire business within and without the State as the property of such corporation within the State bears to its entire property employed in such business both within and without the State; provided however, that in the case of a railroad, telegraph, etc., company, having lines that enter into or extend out of or across the State, property within the State shall be held to mean that proportion of the entire property of such corporations engaged in such business which its mileage within the State bears to the entire mileage within and without the State.

Mr. Justice Holmes delivered the unanimous opinion of the Court, and says:

> "It will be seen that it purports to be a *special excise tax upon doing business* in the State. As the law is administered, the Tax Commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds, and assesses the proportion of this value that the *main track mileage* in North Dakota bears to the main track of the whole line. But, on the allegations of the bill, which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a State of plains, very different from the other states, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The State is mainly agricultural. Its markets are outside its boundaries, and most of the distributing

centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other States. So, looking only to the physical track, the injustice of assuming the value to be evenly distributed according to main track mileage is plain. But that is not all.

"The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart, not, in other words, to open to taxation what is not within the State. Therefore, no property of such of an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. Hence the possession of bonds secured by mortgage of lands in other States, or of a land grant in another State, or of other property that adds to the riches of the corporation, but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State. *St. Louis Southwestern R. Co. v. Arkansas,* 235 U.S. 350, 364, 59 L. ed. 265, 272, 35 Sup. Ct. Rep. 99. In this case, it is alleged, the Tax Commissioner's valuation included items of the kind described to very large amounts. The foregoing considerations justify the preliminary injunction that was granted against what would appear to be an unwarranted interference with interstate commerce, and a taking of property without due process of law. *Fargo v. Hart,* 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498, *Union Tank Line Co. v. Wright,* 249 U. S. 275, 282, 63 L. ed. 602, 607, 39 Sup. Ct. Rep. 276.

"The Attorney General of the State, in his very candid argument, suggested that if the mode adopted

by the tax commissioner were open to objections, the statute might be construed to give him an election as to the method of distribution, and that he should take gross earnings, or, if more easily ascertainable, the property or mileage basis of distribution. As we are dealing only with a preliminary injunction, we confine our consideration to a general view of the mode actually followed, and upon that we are of the opinion that the decree should be affirmed."

There was a distinct declaration from the Court that value outside the State cannot be imported into the State for the purpose of taxation, as this bears directly on interstate commerce. The facts in the *Hines* case and the facts in the case at bar and the statute attempting to levy the tax are in all respects the same. The method adopted in each case was the same, and under this case alone the Court should continue the injunction to the hearing.

Following this case came the case of *Royster Guano Company v. Virginia,* 253, U. S. 412, decided June 7, 1920, in which the Supreme Court declared unconstitutional the statute of the State of Virginia imposing an income tax of 1 per cent upon the aggregate amount of the income of each person or corporation within the State, with specific deductions and exemptions, but including in income, "all profits from earnings of any partnership or business done in or out of Virginia and also all such gains and profits derived from any source whatever."

Just previous to this case, and on March 1, 1920, the Supreme Court decided the case of *Shaffer v. Carter,* 252 U. S. 37. The question before the Court arose upon the construction of a statute of Oklahoma taxing the income from property owned of every business, trade or profession, carried on in the State by persons residing elsewhere. The opinion was written by Mr. Justice Pitney. Complainant

contended that under the due process clause the State was without jurisdiction to levy a tax upon income of a nonresident and that the law was invalid because imposed upon all of his property, real and personal without regard to the relation to the production of his income.

In upholding the case as being a tax upon property within the State of Oklahoma, the Court says:

> "Oklahoma has assumed no power to tax nonresidents with respect to income derived from property or business *beyond the borders of the State.* The first section of the act while imposing a tax upon inhabitants with respect to their entire net income arising from all sources, confines the tax upon nonresidents to their net income from property owned and business, etc,. carried on within the State."

The Court made it clear that as the tax was assessed upon property within the State the statute was valid.

This brings us then to the case of *Underwood Typewriter Company v. Chamberlain* decided November 25, 1920, 254 U. S. 113; 65 L. Ed. 165. This opinion was by Mr. Justice Brandeis, and is rather unsatisfactory, to say the least. The tax in question was one fixed by the Legislature of Connecticut in establishing a comprehensive assessment of taxation applicable alike to all foreign and domestic corporations carrying on business within the State. It divided the various business corporations into different classes and taxed them by different methods, but the tax was specifically a tax upon net income *earned from business carried on within the State.*

Under this statute a corporation was required to state in its returns to the Tax Commissioner from what general sources its profits were derived. If the net profits were derived principally from ownership, sale, rental of real property, or from the sale or use of tangible property, the tax is

imposed to such proportion of the whole net income as the fair cash value of the real and tangible personal property within the State bears to the fair value of all the real and tangible property of the company. If the net profits of the company were derived principally from intangible property, the tax is imposed upon such proportion of the whole net income as the gross receipts within the State bear to the total gross receipts of the company. The plaintiff was engaged in manufacturing typewriters and selling its products and accessories which it purchased and in repairing and renting machines. Its main office was in New York but all of its manufacturing was done in Connecticut. It had branches in other States. All articles made by it and some which it purchased were stored in Connecticut until shipped direct to the branch offices.

The Court held that the statute was valid and that it did not violate the 14th Amendment and in support of this referred to the case of *Shaffer v. Carter* just cited.

The statute in this case and the statute in North Carolina are two different propositions. The Connecticut statute specifically provides that the general sources of the profits were to be looked into before the tax was levied. The profits derived were mainly derived in Connecticut. The proportion of its real and personal property within the State was 47 per cent of its whole.

The Supreme Court has just decided the case of *Davis, Director General, v. Wallace,* January 9, 1922. It had before it the construction of an act of North Dakota levying a special excise tax of fifty cents for each $1,000.00 of capital actually invested in the transaction of business within the State provided that in case of corporations engaged in business partly within the State and partly without the State the investments within the State

should be held to mean that proportion of its entire stock and bond issue which its business within the State bears to its total business within the State as not otherwise more easily and certainly separable from such entire business within and without the State, the business within the State shall be held to mean such proportion of the entire business within the State as the property of such corporation within the State bears to its entire property employed in such business both within and without the State; provided that in the case of railroads, etc., having lines that enter into and extend out of or across said State, the property within the State shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the State bears to the entire mileage within and without the State. The Court through Mr. Justice Van Deventer held this statute to be unconstitutional. The Court says:

> "The taxing officers at first assessed the tax for the year 1918 against these companies by using in its computation the mileage ratio prescribed in the second proviso of the statute; but this Court held that the tax so assessed was an unwarranted interference with interstate commerce and a taking of property without due process of law. *Wallace v. Hines,* 253 U. S. 66. Thereupon the taxing officers assessed the tax for that year, and also for 1919, by using in its computation the ratio specified in the last preceding clause of the statutes—that is to say, a ratio fixed by *contrasting the value of the company's railroad within the State with the value of its entire railroad within and without the State.*"

The Court further says:

> "In the District Court the validity of the tax assessed on the new or substituted basis was challenged on the grounds (a) that as to railroad companies

whose lines lie partly within and partly without the State the statute does not authorize or sanction a tax assessed on that basis; (b) that the statute imposes the tax only as a special excise on doing business in the State, and these companies were not thus engaged during the years for which the tax was assessed—their railroads being then under Federal control and operated exclusively by the Director General; and (c) that an excise tax assessed against these companies on the new or substituted basis operates necessarily to burden interstate commerce and to take property without due process of law, and so is in conflict with the commerce clause of the Constitution and the due process clause of the Fourteenth Amendment."

He says further:

"The first of the objections made to the tax is that it was assessed on a basis which the statute does not authorize or sanction. Of course, if this be so the tax must fall, and the other objections need not be considered. The statute does not prescribe a single or unvarying basis whereon the tax shall be assessed, but designates several bases and defines the particular situation in which each shall be applied. Where the business of the corporation is wholly within the State the tax is to be computed according to the 'capital actually invested' in the business. Where the business is partly within and partly without the State the computation is to be based on a proportion of the company's 'entire stock and bond issues,' which is to be taken as representing the 'investment within the State.' But the proportion is to be determined by standards which vary materially. In one situation it is to conform to the ratio of the company's business within the State to its total business, and in another to the ratio of the company's property employed in its business within the State to its entire property employed in its business wherever conducted. In the instance of railroad companies and other public

utility corporations having lines partly within and partly without the State the statute specifically provides that it shall conform to the ratio of the company's mileage within the State to its entire mileage. This special provision is embodied in a proviso or excepting clause which comes immediately after the clause relating to other corporations, and reads as follows:

> '_____provided, that in the case of a railroad, telephone, telegraph, car or freight line, express company or other common carrier, or a gas, light, power or heating company, having lines that enter into, extend out of or across the State, property within the State shall be held to mean that proportion of the entire property of such corporation engaged in such business which its mileage within the State bears to its entire mileage within and without the State.'

"This provision shows that the Legislature intended by it to put the corporations which it describes in a separate class for the purposes of the tax, to require as to them that the tax be computed and assessed on the special basis there prescribed, and to exempt them from the bases applicable to other corporations. That intention hardly could have been more clearly expressed.

"True, this provision was held in *Wallace v. Hines, supra,* to be in conflict with constitutional limitations and indefensible as respects the railroad companies now before us; but that does not make the provision any the less a key to the intention of the Legislature, or enable the taxing officers to subject these corporations to other provisions from which the act as a whole shows the Legislature intended to except them.

"Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision

was enacted and which it was intended to qualify or restrain. The reasoning on which the decisions proceed is illustrated in *State ex rel. v. Dombaugh*, 20 Ohio St. 167, 174. In dealing with a contention that a statute containing an unconstitutional proviso should be construed as if the remainder stood alone, the court there said: 'this would be to mutilate the section and garble its meaning. The legislative intention must not be confounded with the power to carry that intention into effect. To refuse to give force and vitality to a provision of law is one thing, and to refuse to read it is a very different thing. It is by a mere figure of speech that we say an unconstitutional provision of a statute is 'stricken out.' For all the purposes of construction it is to be regarded as part of the act. The meaning of the Legislature must be gathered from all they have said, as well as from that which is ineffectual for want of power as from that which is authorized by law.'

"Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the Legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that restricted meaning did they receive the Legislative sanction which was essential to make them part of the statute law of the State; and no other authority is competent to give them a larger application. Had they been enacted without the excepting provision and had it been embodied in a subsequent amendatory act a different situation would be presented—one in which that provision would have no bearing on the meaning or scope of the others—because an existing statute cannot be recalled or restricted by anything short of a constitutional enactment. This was recognized in *Truax v. Corrigan* (December 19, 1921), where, when an amendatory exception proved unconstitutional, we held that the original statute stood wholly unaffected by it.

"From what has been said it follows that to sus-

tain the tax in question we should have to hold that the taxing officers, on finding that it could not constitutionally be assessed on the basis specially prescribed in the statute, were at liberty to assess it on another and different basis which the statute shows was not to be applied to corporations of the class to which these railroad companies belong. Of course, we cannot so hold."

The last case upon the subject is that of *Gillespie v. the State of Oklahoma,* decided by the Supreme Court of the United States, January 30, 1922. In this case Chapter 164 of the Oklahoma laws of 1915 makes every person in the State liable to a tax upon his entire net income arising from all sources such as is exempted from taxing by some law of the United States or of the State. The suit was brought to enforce the collection from the plaintiff upon net income derived by him as lessee from leases of restricted Indian lands, the leases being of the kind dealt with in the case of *Choctaw, Oklahoma & Gulf Railroad Company,* 235 United States 292. The facts set forth that the lessee was an instrumentality used by the United States in carrying out duties to the Indians that it had assumed, and that the only question in the case was whether the plaintiff in error was liable to this kind of tax.

The Supreme Court says:

"In *Choctaw, Oklahoma & Gulf R. R. Co. v. Harrison,* 235 U. S. 292, it was held that such a lessee could not be taxed on the gross sales of coals from Choctaw and Chickasaw mines, when the tax was in addition to taxes collected upon an *ad valorem* basis. In *Indian Territory Illuminating Oil Co. v. Oklahoma,* 240 U. S. 522, it was held that a similar lessee could not be taxed upon the value of an Osage oil lease. Subsequently the principle was applied *per*

curiam to gross production taxes under a later statute of 1916, without reference to the fact that the taxes, instead of being in addition to, were in lieu of all taxes upon property rights. *Howard v. Gypsy Oil Co.*, 247 U. S. 503. *Large Oil Co. v. Howard*, 248 U. S. 549.

"The argument for the State is based primarily upon the cases sustaining taxes upon net income that include gains from interstate commerce, *Shaffer v. Carter*, 252 U. S. 37, 57; *United States Glue Co. v. Oak Creek*, 247 U. S. 231; when 'all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses.' *William E. Peck & Co., Inc., v. Lowe*, 247 U. S. 165, 175. It is said also that tangible property within the State is subject to taxation and that therefore the defendant's share of oil and gas can not escape. If the cases that we have mentioned as decided *per curiam* tend to oppose the State's position, on the ground that if the property is exempt the income from it also is exempt, it is urged that so far as appears the distinction between the Statute of 1916 then before the Court and the statutes dealt with by the authorities cited in those cases were overlooked.

"We cannot assume that there was the oversight supposed. The decision in 240 U. S. 522, that such leases were not taxable went on general principles not on the nature of the particular statute, and in *Shaffer v. Carter*, 252 U. S. 37, 48, a case that adverted to the distinction relied upon, pp. 57, 58, the decisions *per curiam* were referred to as decided upon the merits. Those decisions appear to us to have been correct. The criterion of interference by the States with interstate commerce is one of degree. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if States are to exist and make laws. *New York, New Haven & Hartford R. R. Co. v. New York*, 165 U. S. 628. *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 616. The rule as to instrumentalities

of the United States on the other hand is absolute in form and at least stricter in substance. *Williams v. Talladega,* 226 U. S. 404, 416, 417, 419. *Johnson v. Maryland,* 254 U. S. 51, 55. 'A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.' 240 U. S. 530. The step from this to the invalidity of the tax upon income from the leases is not long.

"In cases where the principal is absolutely immune from interference an inquiry is allowed into the sources from which net income is derived and if a part of it comes from such a source the tax is *pro tanto* void; *Pollock v. Farmers' Loan & Trust Company,* 157 U. S. 429, 158 U. S. 601; a rule lately illustrated by *Evans v. Gore,* 253 U. S. 245; and applied in a case somewhat like the present by the Supreme Court of Hawaii. *Oahu Ry. & Land Co. v. Pratt,* 4 Hawaii, 126. Whether this property could be taxed in any other form or not, it cannot be reached as profits or income from leases such as those before us. The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases, and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards. *Weston v. Charleston,* 2 Pet. 449, 468."

Tested then, by these decisions of the Supreme Court of the United States, this tax is void because, in the very words of the Act, it purports to levy a tax for the privilege of engaging, not in intrastate business, but in inter- and intrastate business. The basis of the assessment upon which the tax is levied includes the receipts derived from interstate commerce and, not only that, but includes property outside of the State, which does not add to the value of the road and the rights exercised within the State.

It does not come within the rule laid down by the Supreme Court in the *Galveston, Oklahoma* and *Looney* cases, because it attempts to levy a tax on gross revenue

which is in addition to the tax collected and levied upon an *ad valorem* basis upon the property and assets of the corporation.

The defendants relied greatly on the case of *Maine v. Grand Trunk Railroad* but the Supreme Court in the *Galveston* case distinctly says, in construing the *Galveston* case, *that*—

> "The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern."

Wherever, in the decisions above quoted, a tax similar to this tax has been upheld, it was upheld because it was in lieu of all other taxes and therefore an exercise, in good faith, of the taxing power, and not an unconstitutional burden upon interstate commerce. In this case, however, an *ad valorem* tax upon the same assessment has been levied, and by the State assessing officers distributed to all of the counties, towns and special tax districts, and paid as an *ad valorem* tax, and it would be an anomaly to say that this franchise tax upon the same valuation was not in addition to the *ad valorem* tax already assessed and paid.

(c) The tax is upon property outside the State of North Carolina.

Evidence which is uncontradicted shows that this complainant has large terminals and other property outside of the State of North Carolina, which property was included in the assessment made by the Commissioners. It also shows that the cost of building and maintaining the main line of this Company in the States of Virginia and Alabama is much greater than the cost of its lines in North Carolina (see affidavit of P. R. Albright, Record page 106. affidavits.) It shows that approximately three-fourths of the total operating revenue allocated to North

Carolina are derived from interstate business and that 54 per cent of all freight traffic handled in North Carolina consists of interstate traffic, commonly known as transstate traffic, which has neither origin nor destination within the State, and which is composed of such high class revenue producing commodities as fruits, vegetables, strawberries, and other perishable products, which are handled in special equipment, such as refrigerator and ventilator cars, which cars are moved in fast freight service, and that the cost of handling such perishable traffic, considering initial and terminal services incident thereto, is largely in excess of the average cost of handling business on the Atlantic Coast Line; and that in crediting North Carolina with the straight mile pro rata of the revenue on such traffic without deductions for assembling, terminal, or handling charges in connection therewith, and in charging to North Carolina, equally, a ratio of operating expenses applicable to the business on the entire line, results in allocating to North Carolina a net revenue in excess of that which is actualy earned within said State.

The affidavit also shows that the operating results allocated to North Carolina and reported by this complainant to the North Carolina Tax Commission, do not include any amounts representing proportions creditable or chargeable to North Carolina for the following items of income:

Equipment rents,
Uncollectible Railway Revenue,
Joint Facility rents,
United States Government Taxes.

Therefore, to this extent, the reports to the Commission overstate or understate the net operating income in North Carolina. The evidence further shows that there are no

additional charges made to operating expenses assigned to the State of North Carolina, for instance, for transporting coal consumed by the complainant in that State, although such coal is obtained in Alabama, Tennessee, and the Virginia coal fields. This complainant uses no coal mined in North Carolina. (See affidavit of H. C. Prince, Record, p. 100.)

That these facts show an importation of value can not be disputed.

That the complainant owns vast terminals and other property outside of the State, much more valuable in proportion than any terminals in the State of North Carolina, is clearly seen from the affidavits. These facts bring the case clearly within the recent decision of the Supreme Court of the United States in *Wallace v. Hines, supra,* in which the Court said, in declaring the assessment in that case illegal:

> "North Dakota is a State of plains, very different from the other States, and the cost of the roads there was much less than it was in mountainous regions that the roads had to traverse. The State is mainly agricultural. Its markets are outside its boundaries, and most of the distributing centers from which it purchases are also outside. It naturally follows that the great and very valuable terminals of the roads are in other States. So, looking only to the physical track, the injustice of assuming the value to be evenly distributed according to main line mileage, is plain."

Further the Court says:

> "Therefore, no property of such an interstate road situated elsewhere, can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. Hence the possession of bonds secured by mortgage of lands in other

States, or of a land grant in another State, or other property that adds to the riches of the corporation, *but does not affect the North Dakota part of the road,* is no sufficient ground for the increase of the tax—whatever it may be, whether a tax on property or, as here, an excise tax upon doing business in the State."

The same rule of law is laid down in *Fargo v. Hart,* 193 U. S. 490, and in *Coulter v. Weir,* 127 Federal 897.

Upon the argument at bar the defendants contended that they used the reports which were required by the Tax Commission to be filed by the railroad companies, showing earnings and other matters, and that in making the assessment they used these reports as one of the bases upon which to determine the valuation and assessment.

These reports were not filed with the Tax Commission for the purpose of taxation but were filed for other purposes by an order of the Tax Commission, and defendants lose sight of this fact and of the further fact that the reports were made up in the form required by the Tax Commission for purposes other than taxation.

Therefore, the use of these reports and the use of the reports which the Tax Commission ordered the railroad companies to file with them, which were copies of the reports filed by the railroads with the Interstate Commerce Commission in its investigation in *Ex parte* 74, which was a proceeding before the Interstate Commerce Commission for the increase of freight and passenger rates and fares throughout the United States, was unjustified and was a radical departure from the mode of assessment laid down by the statute to be followed by the Tax Commission in making the valuation.

The Board was notified that these reports were not correct for taxation purposes. (See affidavits of Mr. Murray

Hubbard and Mr. W. L. Stanley in *Southern Railway* case filed on behalf of all railroads.)

In the first place the Interstate Commerce Commission did not base its decision in the increase of rates in *Ex parte* 74 upon the reports made by the railroad. That will be found from the decision of the Interstate Commerce Commission in *Ex parte* 74 which, of course, this Court will examine.

In the second place, the railroad companies were not notified that the Tax Commission would use these reports for that purpose and were not given a hearing upon that question in order to produce proof to uphold the railroad companies' contention.

In the case of *L. & N. Railroad vs. Bosworth, et al.*, 209 Federal, 380, at page 445, the Court says:

> "I am clear, also, that the board did not have the right to use plaintiff's report to the Railroad Commission without its being notified thereof, and given an opportunity to be heard in regard to the matters therein relied on as affecting the assessment. It was from items in that report, in connection with items in plaintiff's report to its stockholders, that the board was enabled to determine the gross receipts proportion and the net income proportion which it averaged with the mileage proportion, thereby obtaining the percentage which it used in apportioning a part of plaintiff's capital stock to this State. Without those items it would have been unable to make such apportionment and would have been limited to the mileage proportion. By means thereof it was enabled to raise the apportionment 10 per cent, and thereby add possibly as much as $25,000,000 to plaintiff's assessment. This it did without an opportunity on plaintiff's part to say one word in regard to it.
>
> "An authority in support of plaintiff's position that it was entitled to know of the contemplated use of

this report and to an opportunity to be heard in regard thereto is the case of *Interstate Commerce Commission v. L. & N. R. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431, Mr. Justice Lamar there said: * * * * * *

" 'The commission is an administrative body and, even where it acts in a *quasi* judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. * * * But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are awarded or defended. In such cases the commissioners cannot act on their own information as could jurors in primitive days. All parties must be fully apprized of the evidence submitted or to be considered, and must be given an opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.'

"The fact that it was plaintiff's own report which was used does not make a difference. Whilst plaintiff can hardly be heard to say that its own statement is not true, it can be heard to say in what sense it intended the statement to be taken as true. It was not made for assessment purposes or to enable anyone to form a judgment as to the gross receipts or net income proportions of the plaintiff. According to the affidavit of plaintiff's comptroller, the items therein relied on were made for comparative purposes only, i. e., to compare one year with another, and otherwise they were arbitrary in character. A consideration of all he says in regard thereto suggests the possibility at least that plaintiff has been done an injustice in the use which the board made of those items. The plaintiff had the right to make the explanation to the board, and it is not to be presumed that it would not have given it whatever weight it is entitled to."

But we do not have to go further than a decision in the Federal Court of the Eastern District of North Carolina, *ex parte Lam Pui,* 217 Federal, 456, to show the use of such documents is not evidence and any findings upon such reports by an administrative body is illegal.

That was an application for a writ of *habeas corpus* by a Chinaman who had been ordered deported by order of the Secretary of Labor. One of the points raised by the petitioner was:

> "That the Secretary of Labor was without authority or jurisdiction to issue said warrant or direct the deportation of petitioner, for that no evidence or proof to sustain the charge made in the original warrant, or the finding in the order of deportation, had been submitted to the said Secretary, and without such proof the said proceeding and warrant were void and of no legal effect."

The Court says, page 462:

> "While a statute conferring power to summarily hear and determine rights of person or property, and make final orders affecting such rights, will be so construed as to effectuate the purpose of the legislative department of the government, in respect to its administration, those methods of procedure which experience has demonstrated to be necessary for the protection of such rights against oppressive and arbitrary conduct will be enforced. The Courts will not weaken the efficiency of the legislation, or the power conferred upon the administrative officers; but they will not sacrifice substantial and essential rights to summary procedure. This principle is especially applicable when human liberty is involved. While the petitioner is not entitled to demand the constitutional guaranties accorded to our citizens of birth and adoption, he is entitled, by virtue of the certificate issued and passed upon by the lawful authorities, under the supreme law of the land—the treaty be-

tween this republic and China—to demand that he be accorded a fair hearing, as near as may be in accordance with elementary rules of procedure obtaining in all nations having organized government, securing the liberty of its own citizens and those of other nations within its borders by invitation or permission."

In that case this Chinaman was ordered deported, not upon evidence, but upon the statement of the Inspector in charge and this Inspector was not sworn. Upon the statement of the Inspector the Secretary of Labor made an order that he was satisfied that the alien had violated the act so the real question was, whether there was proof in the case and whether, if so, it was legal proof. The judge decided it was not.

On page 463, he says:

"In *Hanges v. Whitfield* (DC) 209 Fed. 675, upon the return of a writ of *habeas corpus,* petitioner being in custody under a warrant directing his deportation, Reed, District Judge, said:

" 'The Court will not in proceedings of this character, consider the testimony or the weight thereof, if properly and fairly taken, to determine whether or not it is sufficient to warrant the deportation of an alien. That would be for the proper immigration officials to determine. But the Court may, and it is its duty to, consider the manner of procuring the testimony, its competency and legal admissibility against the petitioners, and determine whether or not they have had a fair and impartial hearing or trial.' "

And further on page 465:

"Long, and frequently sad, experience teaches that when officers intrusted with the administration of laws affecting the liberty of men are permitted to set aside and disregard those safeguards which the wisdom of the ages have set up for the protection of liberty, in respect to those of one race or color,

one creed or clime, it is but a short, and easily taken, step to do so when the liberty of the citizen is involved. If necessity, or the public safety, demands that swift, unusual, and summary methods of procedure be permitted, the power should be conferred by the people's representatives in Congress in clear and unmistakable terms, and not by rules of departments conferring such power upon inspectors."

The same line of reasoning is shown in the decision of *ex parte Lam Fuk Tak,* 217 Federal, 468.

Interstate Commerce Commission vs. L. & N. Railroad, 227 U. S. 88.

In the latter case, the Supreme Court passed upon the legality of an order of the Interstate Commerce Commission reducing rates of the L. & N. Railroad.

In the Court below the railroad company, exhibited all the evidence that had been introduced before the Commission in addition to other evidence introduced in the Circuit Court, as a basis for the contention that this evidence produced before the Commission utterly failed to show that the rates attacked were unreasonable.

The Court, before whom the case was pending, sustained the view of the Railroad and held the order void, because there was no material evidence to support it.

The Supreme Court in its opinion says:

"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the governments' contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could

disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, *quasi* judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.' (*Tang Tun v. Edsell,* 223 U. S. 681, 56 L. ed. 610, 32 Sup. Ct. Rep. 359; *Chin Yow v. United States,* 208 U. S. 13, 52 L. ed. 370; 28 Sup. Ct. Rep. 201; *Low Way Suey v. Backus,* 225 U.S. 468, 56 L. ed. 1167, 32 Sup. Ct. Rep. 734; *Zakonaite v. Wolf,* 226 U. S. 272, *ante,* 218, 33 Sup. Ct. Rep. 31), or if the facts found do not, as a matter of law, support the order made, (*United States v. Baltimore & O. S. W. R. Co.,* 226 U. S. 14, *ante,* 104, 33, Sup. Ct. Rep. 5, Cf. *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission,* 206 U. S. 20, 51 L. ed. 942, 27 Sup. Ct. Rep. 585, *Wisconsin M. & P. R. Co. v. Jacobson,* 179 U. S. 301, 45 L. ed. 201, 21 Sup. Ct. Rep. 115; *Washington ex rel. *Oregon R. & Nav. Co. v. Fairchild,* 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535, *Interstate Commerce Commission v. Illinois Central R. Co.,* 215 U. S. 470, 54 L. ed. 287, 30 Sup. Ct. Rep. 155, *Southern P. Co. v. Interstate Commerce Commission,* 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; *Muser v. Magone,* 155 U. S. 247, 39 L. ed. 137, 15 Sup. Ct. Rep. 77)."

Under the authority of these cases, therefore, and the admissions in the answers that the Commission had used these reports, it is clearly shown that the assessment included value outside of North Carolina, was not made in

accordance with the mode prescribed by the statute of North Carolina, and was made upon the reports filed for different purposes which could not be used by the Commission as a basis of valuation.

PART FIVE

THE AMENDMENT OF THE FRANCHISE TAX LAW PASSED AT THE SPECIAL SESSION OF 1921 DOES NOT VALIDATE THE TAXES ASSESSED IN THIS CASE, NOR DOES THE AMENDMENT CHANGE THE EFFECT OF THE STATUTE.

It will be contended by counsel for defendants that new Section 78, as amended by the special session of 1921, had the effect to validate the taxes levied here.

The Consolidated Statutes of North Carolina, 1919, Section 3950, provides:

> "3950. *Construction of amended statute.* Where a part of a statute is amended it is not to be considered as having been repealed and re-enacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having enacted at the time of the amendment."

The franchise act was enacted at the January session of 1921, which ended in March, 1921. The amendment, which was Section 78, was enacted at the December, special session of 1921. In the meantime the franchise tax, provided for under Section 82 (6½) of the January session of 1921, had already been assessed by the Commissioner of Revenue and certified down, and under that act the taxes became a lien upon the railroad company's property. This, of course, was prior to the special session in December, 1921. The taxes were due in October, and certainly no law passed in December could have the effect to change the legality or illegality of these taxes. For

convenience the statutes are here set forth in parallel columns:

Section 82 (6½)	New Section 78
"* * * The State Tax Commission shall ascrtain and certify to the State Auditor the value upon which the amount of taxes which shall be paid by any such railroad company as a franchise or privilege tax shall be calculated."	"* * * the Commissioner of Revenue shall ascertain and certify to the State Auditor the value upon which the amount of tax to be paid by any such railroad as a license or privilege tax shall be calculated."
"* * * the extent to which every such railroad company is exercising its franchise in this State shall be found to be the value of the property, tangible and intangible, of each railroad company in the State assessed for the year in which such report is made for *ad valorem* taxes."	"* * * The measure of extent to which every such railroad company is carrying on intrastate commerce within the State of North Carolina shall be the value of the total property, tangible and intangible, in this State of which such railroad company is assessed for *ad valorem* taxation for the year in which such report is made."
"The franchise tax of each such railroad company for the privilege of exercising its franchise in this State shall be," etc.	"The tax which every railroad company shall pay for the privilege of carrying on intrastate commerce within this State shall be," etc.
	"Provided, that it is the intention of this section to levy upon railroads a license or privilege tax for the privilege of engaging in intrastate commerce carried on wholly within the State of North Carolina and not a part of interstate or foreign commerce; that the tax provided for in this section is not intended to be a tax on the privilege of engaging in interstate commerce, nor is it intended to be a tax on the business of interstate commerce, nor is it intended to be a tax having any relation to the interstate or foreign business or commerce in which any such railroad company may be engaged in addition to its business in this State."

It will be seen that Section 82 (6½), quoted above, says

"franchise or privilege tax" while Section 78 calls it "license or privilege tax." Section 82 (6½) provides that the extent to which a railroad company should exercise its "franchise" should be the value, tangible and intangible, etc., for *ad valorem,* while Section 78 of the new law provides that the "measure of the extent to which every railroad company is carrying on intrastate commerce within the State shall be of such value." Section 82 (6½) provides that "the franchise of each such railroad for the privilege of *exercising its franchise in this State,* shall be," etc. Section 78 sets out that it is the intention to levy upon the railroads a license or privilege tax on the privilege of engaging in intrastate commerce carried on wholly within the State, and not as a part of the interstate or foreign commerce, and the tax is not intended to be a tax for the privilege of engaging in interstate commerce, nor on the business of interstate commerce, nor to have any relation to foreign or interstate business or commerce in which such railroad may be engaged in *addition to its business in the State.*

The only effect that the new statute can have is to show that the Legislature recognized the fact that the tax levied at the January session of 1921 was in truth and in fact a tax upon interstate commerce and, therefore, void, and has attempted by this method to remedy the defect. If it does remedy the defect, which we deny, it can not remedy the defect as to taxes which had already been imposed, as under Section 3950 of the Consolidated Statutes of North Carolina, 1919, just quoted, new provisions are only effective from the time of the amendment, otherwise they would be in contravention not only of the statute, but of the Constitution.

In *Cooley on Taxation, Third Edition,* at page 494, the author says:

" 'New burdens,' it is very justly said, 'ought always to be prospective,' and it is reasonable to suppose the Legislature has intended that they should be. Such a supposition is in harmony with the general rule of law which requires that the Courts 'always construe statutes as prospective and not retrospective, unless constrained to the contrary course by the rigor of the phraseology.' This rule applies also to constitutional provisions; and it obtains not only as a construction of the grant of power, but also as to all the incidents; though a remedial provision may well be presumed to have been intended to reach back for the purposes of justice."

The Courts will not give to a law retrospective powers even when they might do so without violation of the Constitution, unless the intent of the Legislature is clearly expressed in favor of such retrospective powers, except in the case of remedial statutes, and those which relate to statutes in the Courts it is the general rule that acts of the Legislature will be so construed as to make them operate retrospectively unless the Legislature has explicitly declared its intention that they should so operate, unless such intention appears by necessary implication from the nature and words of the act so clearly as to leave no room for a reasonable doubt on the subject.

Black on Interpretation of Law, page 250.

Presumptively, tax laws are to have a prospective operation only, and remedies they provide for collection will not be applied to taxes previously laid, unless an intent that they shall be is clearly manifested. Provisions in a statute which make radical changes in the rights of parties shall be treated as prospective.

1 *Desty on Taxation,* 104.

In *Waddill v. Masten,* 172 *North Carolina* 582, 90 *Southeastern* 694, Mr. Justice Hoke, writing the opinion of the Court, says:

"The general rule is fully recognized with us that a statute will be given prospective effect only, unless the law in question clearly forbids such a construction. *Mann v. Allen,* 171 N. C. 219, 88 S. E. 235. A retrospective law, however, within the meaning of the principle, is one that, in some way, affects the rights and liabilities of parties incident to and growing out of a transaction that has passed."

In *State v. Haynie,* 169 *North Carolina* 277, 84 *Southeastern* 385, 387, Mr. Justice Walker, writing the opinion of the Court, says:

"We have held distinctly that a statute will not be construed as retrospective in its operation unless it was clearly intended so to be, and especially where such a construction would take away rights under a former law, though they may be of a kind which the Legislature could divest by proper action if so minded."

In *Mann v. Allen,* 171 *North Carolina* 219, 88 Southeastern 235, the Court was construing the effect of a school district tax. The opinion is by Mr. Justice Hoke, who says:

"In reference to the question thus presented, in a proceeding of this character, legislative in its nature and involving chiefly the repeal of a tax, it is very generally held that, as to taxes already levied, the same will be given a prospective effect only unless the law controlling the matter clearly forbids such a construction."

Further he says, page 236:

"* * * when used in reference to taxation, it more generally refers to the imposition of a tax by the Legislature, or under proper legislative sanction, or to the apportionment of such a tax to the individual taxpayer and placing the same on the official lists preparatory to their collection, and in some instances is said to be the equivalent of 'assessment.'"

This case, therefore, holds the two principles for which we are contending; *First,* that the Act of the Special Session of December, 1921, must be construed prospectively, and, *Second,* that the taxes had already been levied, and, therefore, the amendment cannot have any retroactive effect.

In *Corporation of Elizabeth City v. Commissioners of Pasquotank County,* 146 North Carolina 539, 60 Southeastern 416, which is one of the leading cases in North Carolina, the Court, through Mr. Justice Walker, says:

> "It is an elementary rule of construction that a statute will not be declared to be retroactive, unless it was clearly intended so to be, and especially where such a construction would take away rights acquired under a former law, even though the Legislature would have the constitutional power thus to divest them. *State v. Littlefield,* 93 N. C. 614. It is a sound, general principle, that no statute takes effect as of a time prior to its ratification, nor has effect by any fiction or relation before it was actually passed, unless it is so declared in the statute, either expressly or by clear implication."

This being the rule of construction which the Supreme Court of North Carolina declares must be followed in construing statutes of North Carolina, this Court is, therefore, bound by these rules.

PART SIX.

THE DISCRIMINATION IS SYSTEMATIC AND INTENTIONAL.

I.

The Undervaluation of Property Other Than Railroad Property Was Intentional and Systematic.

The so-called Revaluation Act, Chapter 84, Public Laws 1919, was passed by the General Assembly of North Carolina at its session in 1919, and ratified on the 11th day of March, 1919. The Act, Section 2, recognizes that there had been a systematic undervaluation of property throughout the State, for it provides:

> "That for the purpose of making a complete list of all of the property of every citizen of the State, real, personal and mixed, *and of having all of such property valued in accordance with the rule laid down in the Constitution of the State at its true value in money,* and to be adopted and used as a basis of all taxes levied by the State, counties, cities, towns and other taxing districts of the State for the year one thousand nine hundred and twenty, the machinery hereinafter set out is provided."

In Section 5 it provided:

> "In considering the increased cost of material and labor these factors shall be considered upon the basis of such increase as may be deemed to be normal, or stable, and not such temporary increase as obtained during, or immediately on account of, war conditions, and in estimating the real value of land, it shall be with reference to the normal or stable value and not with reference to the temporarily inflated

values, but in all cases the appraiser shall determine what is the actual fair market value of the property."

It provided that the valuation of the property should be made as of May 1, 1919. See Sections 12 and 31. In Section 32, however, it provided that all corporations except railroad, telegraph, telephone, and street railway companies should be assessed annually as of the first day of January. In Section 31, however, it provided that as of the first day of May, 1919, the State Tax Commission should make a complete revaluation of the property of all railroad, telegraph, telephone and street railway companies, to be used as a basis for computing taxes for such companies for the years 1920, 1921, 1922 and 1923, such revaluation to be made in accordance with the general rule and intent and purpose of the act as to all other property.

Nevertheless, and recognizing the fact that property generally in the State was undervalued, and although demanding that it be valued as of May 1, 1919, the Legislature provided in Section 1 that the valuation of the real property for 1919 should be the same as it was for the year before.

The State Tax Commission proceeded to revalue property, and the following facts and figures are shown from the figures taken from the complaints, from the State's answer, and from the report of the State Tax Commission, which is in evidence in this case. The Tax Commission reported in 1920 that the value of all real property in North Carolina *on May 1st,* 1919, was $2,006,124,-999.97, yet this same property was assessed for taxation in May, 1919, at $506,808,394.00, *and this assessment was ratified and approved by the Legislature* in the first section of the Revaluation Act. This shows a ratio of assessed

value to true value of 25.2%. At the same time the property of this complainant was assessed at its full value, and even the State Tax Commission admitted that it was assessed at least 85% of its value. (Record, p. 77.)

At the same time, that is in 1919, the *true value* of the real estate in the thirty counties throughout which this railroad was operating, was $707,216,601.00; (see report of State Tax Commission) whereas the property was *actually assessed* at $164,960,110.00, or a ratio of 23.3 per cent.

The Legislature at its Extra Session in 1920 approved the assessment and valuation made under the Revaluation Act and adopted it as a basis for the levy of tax rates by the State, except as such valuations might thereafter be changed according to law.

The Legislature at its next session, which was begun in January, 1921, immediately proceeded to abolish the rule laid down by it in the Revaluation Act, *to assess property at its true value*, by passing an act permitting the assessing boards to *horizontally reduce* real estate values, and the assessing bodies proceeded to take advantage of the authority given them by the Legislature to violate the Constitution, and decreased by percentages the value of property which cost hundreds of thousands of dollars to work up.

In order to ascertain the percentage of assessed value to true value throughout the State of North Carolina, the complainant and the other railroads reviewed the entire State, examined every conveyance of real estate in ninety-eight out of the one hundred counties of North Carolina, the exceptions being Dare and Green, being small counties, and took a record of every conveyance of one thousand dollars or over that was made from the first day of January, 1921, to the thirtieth day of June, 1921. This

showed that the total assessed value of all of the real estate conveyed during this six months was $20,373,684.07, whereas the consideration and purchase price was $30,598,-475.24, or a ratio of assessed to true value of 66.58 per cent for the entire State. This information is compiled in the affidavit of C. J. O'Brien filed herein. (Record, pp. 114-118.)

The defendants attack this method of showing a systematic undervaluation and cite the case of *Coulter v. L. & N. Railroad,* 196 U. S. 599, and particularly refer to the following quotation in that case.

> "It is obvious that the accidental sales in a given year may be a misleading guide to average values, apart from the testimony that some, at least, of the conveyances did not report true prices, yet they furnish the chief weapon of attack. The testimony as to the Board of Equalization taking 80% of the reported sales was explained by members of the board. It would be going very far to assume that they were committing perjury because, to another mind, the sales seemed more significant and the explanations not very good."

The fallacy of the defendants' contention is seen from an examination of the *Coulter* case, both in the Supreme Court and in the lower Court, 131 Federal, 282. The Supreme Court says, in referring to the statements of sales in different counties:

> "On the other hand there was testimony that the statement of sales did not afford satisfactory evidence of average values, or at least, for various reasons were not regarded by the Board of Equalization as affording it."

An examination of the opinion in the Federal Reporter, at page 294, will readily show the difference between the evidence offered in the instant case and the affidavits in

in that case. Here we have taken every conveyance for a period of six months over one thousand dollars in consideration, and have gotten not the fictitious value, as numbers were in that case, but the actual value as shown by the documentary Government stamps which it is mandatory to place upon transfers on the basis of fifty cents for each five hundred dollars of consideration. Here we have true consideration, there they had many items of fictitious consideration, commissioner's sales, natural love and affection, etc. Here these were not included except at the actual value. Here we have seven or eight thousand conveyances and there only a few hundred. The difference is patent. Here we did not take exceptional sales, but took every single conveyance and examined it and reported the true facts.

The State Tax Commission itself in its report to the Governor used this same method in some instances in ascertaining the value of property.

The evidence which we have produced, the Act of the Legislature itself in declaring in 1919 that the property is not assessed at its true value, and in the same breath approving an assessment for 1919, which it has just declared is not in accordance with the Constitution, and in immediately authorizing a horizontal reduction within six months thereafter, can show nothing to our minds except an intentional and systematic undervaluation of real property, and the argument goes further when it is shown and admitted that no consideration whatsoever was shown to railroad companies in this undervaluation by the Commissioner of Revenue, no reduction or allowance was given to them, and on top of this the Legislature, realizing the fact that revenues would be decreased, superimposed upon the railroads, in addition to the other taxes, an income tax of 3 per cent. The ratio of assessed to true valuation, which we have shown, is admitted. It is admitted in the answers because the ratio is

found by the figures furnished by the State through its answer and report to the Commission.

II.

The Methods Adopted for the Valuation of the Southern, Norfolk Southern, Atlantic Coast Line and Seaboard Air Line Were Not the Same; Did Not Follow the Statute and Are, Therefore, Illegal.

It is admitted that the Southern Railway was assessed on a basis of capitalization of its earnings at 6 per cent. (Record, p. 122) and it is contended by the Southern Railway that the wrong figure was used in capitalizing the earnings. It is admitted by the State that in assessing the Norfolk-Southern Railway it did not use any method whatsoever fixed by the statute, but took the valuation fixed by the Interstate Commerce Commission, which was the physical valuation. (Record, p. 122.) It is practically admitted, and it is a fact, that in assessing the Atlantic Coast Line Railroad Company, the Commission used its investment account and did not make any deductions for outside terminals and other property, not the basis of assessment, to which it added an absolutely arbitrary figure for intangible value. The table heretofore used in this brief gives the basis of calculation upon every known method of assessment. A glance at this table will show that the intangible property was not based upon the method established by the statute, to-wit, the captialization of earnings plan, or the stocks and bonds plan, but upon an arbitrary method pursued by the Commission.

The Commission's report itself shows that it took the investment account, to which it added an intangible value, mark you, not based upon the method prescribed by the

statute, but a different method. The Commission (Record, p. 79) says:

> "Pending this final valuation (that is, the Interstate Commerce Commission's valuation), the railroad lines have submitted to the Interstate Commerce Commission what is known as their investment accounts and have asked that this basis of value be used for determining the scale of rates and amounts of return they are entitled to earn on their properties. *It seems clear to us that the time has come when the value upon which railroad or public utility is permitted to earn a return is the value upon which it shall pay taxes to this State.* In either case the purpose is to find the fair value of the property. *So that generally our valuation of railroad lines in this State is based upon a mileage proportion of their investment account, which they have asked the Interstate Commerce Commission to adopt for making their rates, and to this mileage proportion we have added the value which we find to represent the intangible value of their North Carolina lines, BASED UPON THE VALUE OF BUSINESS IN THIS STATE GREATER THAN THE AVERAGE VALUE OF TRAFFIC ON OTHER LINES AS A WHOLE."* (Italics ours.)

This statement, which is a public document, approved by the Legislature, shows upon its face that the Commission has deliberately set aside the method provided by the Legislature and adopted a different mode of value for railroads. Notwithstanding the solemn report which it made to the Legislature that it took the investment accounts of all railroads and added to this an arbitrary intangible value, in the affidavits filed in this case the defendants stated in the case of the Southern Railway, its assessment was based on an earning value capitalized at 6 per cent. The defendants show that a different method was used in valuing the Southern Railway, the Norfolk-Southern Railway and the Atlantic Coast Line Railroad. The Southern was valued on an earn-

ing basis capitalized at 6 per cent, (Rec. p. 121, 122). In the case of the Norfolk Southern the Commission used the valuation for rate-making purposes tentatively fixed by the Interstate Commerce Commission, based upon reproduction, less depreciation. But in the case of the Atlantic Coast Line Railroad, this complainant, it took its investment account as shown by a report made by this complainant to the Interstate Commerce Commission in the investigation in *Ex parte* 74, which of course, as this Court knows was an investigation made by the Commission of its own motion, into the question of the reasonableness of the rates of freight pending throughout the United States in 1920. These facts show a clear and consistent intention to violate the law of North Carolina in the mode and manner of assessment, and violate the uniformity clause of its constitution, because no one road has been assessed upon the same basis.

This is such a discrimination as the Court found to be the case in *Raymond vs. Chicago Traction Co.*, 207, U. S. 20. In that case Mr. Justice Peckham says, page 36:

> "The case before us is one which the facts make exceptional. It is made entirely clear that the board of equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in the case of other like corporations whose property the board had assessed for the same year. It was not the mere action of individuals, but, under the facts herein detailed, it was the action of the State through the board. There is here no contention of illegality simply because of assessing the franchises of these corporations at a different rate from tangible property in the State, which the State might do, *Coulter v. Railroad,* 196 U. S. 559, but it is asserted that the board assessed the franchises and other property of these companies at a different rate and by a different method from that which had been employed by the board for

other corporations of the same class for that year. The result is an enormous disparity and discrimination between the various assessments upon the corporations. The most important function of the board, that of equalizing assessments, in order to carry out the provisions of the constitution of the State in levying a tax by valuation, 'so that every person shall pay a tax in proportion to the value of his, her, or its property,' was, in this instance, omitted and ignored, while the board was making an assessment which it had jurisdiction to make under the laws of the State. This action resulted in an illegal discrimination, which, under these facts, was the action of the State through the board."

The Tax Commission in its report to the Governor, which was approved by the Legislature says:

"The new assessment of railroads does not represent as great an increase as the average increase of other property *for the reason that they were assessed relatively higher than other property before,* but we anticipate that it will meet the fair demand of public opinion when it is known that they are assessed like other property at their full value, *and upon a valuation quite as high as that upon which they are asking to be permitted to earn a return.*" (Record p. 79.)

This is a clear admission by the defendants that railroad property is valued higher than other property and has been consistently discriminated against. It is a further admission that it is based upon what the Commission says is the value upon which railroads desire to enter returns for rate-making purpose. As previously stated, the Interstate Commerce Commission did not accept the Railroad Company's report.

We, therefore, say that there has been a discrimination against railroads in this case, which was systematic and intentional, but even if the Court finds that it was not sys-

tematic and intentional, we say there has been an assessment based upon an illegal method adopted by the Commission in violation of the statute.

PART SEVEN.

THE ENTIRE SCHEME OF TAXATION IS ILLEGAL.

1. Because in Violation of the Uniformity Clause of the Constitution of North Carolina.

2. Because in Violation of the Commerce Clause of the Constitution of the United States.

I.

It Violates the Uniformity Clause of the North Carolina Constitution.

The Constitution of North Carolina provides, Section 3 of Article 5, and Section 9 of Article 7, that the State, county, town and township taxes *shall be* uniform and *ad valorem* upon all property in the same except property exempt by this Constitution. We say that it *shall be ad valorem* because Section 3 says:

> "Laws *shall be* passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; *and also all real and personal property according to its true value in money.*"

When the Legislature of North Carolina undertakes, in violation of the express terms of the Constitution, to set up a taxing system prohibited by the Constitution, it necessarily is illegal.

The plain mandate of the Constitution provides that uniform *ad valorem* taxes *shall* be levied on real and personal property for State, county, city and township taxes.

The Legislature has seen fit to violate the express provisions of the Constitution of North Carolina and levied

no tax whatsoever on moneys, credits, investments in bonds, stocks, joint stock companies, or real and personal property for State purposes. It has, in violation of this provision of the Constitution, delegated to the counties and cities the right to levy taxes for these purposes, and in order to make up the deficit for the State treasury, created by this system of taxation, it proposes, for State purposes, to levy an income tax and a privilege or franchise tax upon corporations of every class and character. It would appear from the revenue bill that the members of the Legislature vied with each other in ascertaining every class, kind, character and designation of taxes that it could impose upon corporations in North Carolina, so as to prevent taxing the property in North Carolina which Section 3 of Article 5 provides should be taxed.

We have already referred the Court to the *Redmond* case, and quoted from that case to show that these provisions of the Constitution are mandatory. This scheme of taxation is predicated upon the desire to take from the earnings of corporations, and especially of public service corporations in North Carolina, a greater amount in taxation in proportion to their property values than other citizens of the State. The farmer is exempt from paying any tax upon his farm for the operating expenses of the State government. True he, with others, is taxed on his income, but after he has deducted his exemptions, as allowed by the statute, it is plain to be seen that the farmer will pay little or no income tax to the State of North Carolina. No scheme of taxation not authorized by the Constitution of the State can exist.

As said by Justice Shepherd in the *Redmond* case, after referring to various cases:

> "These cases decide that, when the taxing power is exercised for a public purpose, *the Constitution, and*

not the Legislature, declares what property shall be taxed, *and by a uniform rule, and ad valorem.*" (Italics ours.)

In that case there was a question of the taxation of personal property. He then further says:

> *"All taxes, therefore, must be levied as well on personal as on real property."* (Italics ours.)

There was no power or authority in the Legislature to put into effect a scheme of taxation in violation of the mandate of the Constitution. It may be argued that this complainant is not injured because the tax levied against it is only one-tenth of one per cent upon the *ad valorem* value. That is beside the question. The fact remains that this is the only *ad valorem* tax that is levied for State purposes, and, tacked on to this, as against railroads, is a tax upon its gross receipts, when the Constitution of North Carolina, in plain terms, provides that no tax on income shall be levied except the tax on *net* income, and we have already shown that that particular clause of the Constitution must be construed to mean gross income *less all expenses.*

II.

It Violates the Commerce Clause of the Constitution of the United States.

This Court in the Galveston case says:

> "When a Legislature is trying simply to value property, it is less likely to attempt or to effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. *A practical line can be drawn by taking the whole scheme of taxation into account.* This must be done by this Court as best it can. *Neither the State Courts nor the Legislatures, by giving a tax a particular name,*

or by the use of some form of words, can take away our duty to consider its nature and effect." (Italics ours.)

The entire scheme of taxation established by the Legislature of North Carolina must be fully understood in order that it may be determined whether as a whole it is legal.

This scheme is as follows:

(1) There is an *ad valorem* tax levied upon the entire property of the Railroad Company as a going concern at full value fixed by the Commissioner of Revenue upon a valuation of its real and personal property, tangible and intangible, as hereinbefore outlined.

(2) There is then levied upon this same property upon the same valuation an additional tax of one-tenth of one per cent, called a franchise or privilege tax.

(3) There is then superimposed upon these two taxes another tax denominated a "net income tax," which is, when applied to railroad companies, a tax upon its gross income derived from interstate commerce, with two deductions. The statute levying this tax is known as "The Income Tax Act of 1921."

Section 100 of the Act provides:

> "This Act shall be known and may be cited as the Income Tax Act of 1921."

In Section 101 it is said that the general purpose of the Act is to impose a tax for the use of the State Government upon the *net income*, in excess of the exemption set out. In this section is also found the following language:

> "The tax imposed upon the net income of corporations in this schedule is in the nature of a franchise tax for the privilege granted by the State to

domestic corporations and to foreign corporations in this State, and is in addition to the tax imposed by schedule 'C' of this Act."

Schedule "C" of the Act imposes the franchise tax hereinbefore referred to.

By amendment at the Extra Session, 1921, Public laws, p. 129, this section was changed to read:

"The tax imposed upon the net income of corporations under this schedule is in addition to the tax imposed under schedule 'C' of this Act."

By this amendment the Legislature attempted by changing the name of the tax to change the character of it.

Section 202 provides:

"The basis of ascertaining the net income of every corporation engaged in the business of operating a steam or electric railroad, express service, telephone or telegraph business, or other form of public service, when such company is required to keep records according to the standard classification of accounting of the Interstate Commerce Commission, shall be the 'net operating income' of such corporations as shown by their records kept in accordance with that standard classification of accounts, when their business is wholly within this State, and when their business is in part within and in part without the State, their net income within this State shall be ascertained by taking their gross 'operating revenues' within this State, including in their gross 'operating revenues' within this State, the equal mileage proportion within this State of their interstate business and deducting from their gross 'operating revenues' the proportionate average of 'operating expenses' or 'operating ratio' for their whole business, as shown by the Interstate Commerce Commission standard classification of accounts. From the net operating income thus ascertained, shall be deducted 'uncol-

lectible revenue' and taxes paid in this State for the income year, other than income taxes and war profits and excess profits taxes, and the balance shall be deemed to be their net income taxable under this act."

This income tax it will thus be seen is a tax practically upon the gross income of the complainant, which income is derived partly from interstate commerce and partly from intrastate commerce, three-fourths of which in North Carolina, as shown by the record herein, being derived from interstate commerce. (See affidavit of H. C. Prince, Rec., p. 101.)

It attempts to tax such part of the operating revenue of the complainant which it derives from interstate commerce as is represented by the proportion of the mileage of railroad in North Carolina to the total mileage of railroad of the complainant's entire system which extends into many States. The amount of the income tax, therefore, is largely dependent upon the amount of interstate commerce done by the complainant in other States, as well as North Carolina, which, of course, is a direct burden upon interstate commerce. When this entire scheme is taken into consideration, it is plain to be seen that it is vicious. The so-called franchise or privilege tax and the income tax are not made a part of the general scheme of valuation, nor a part of the *ad valorem* tax, but are imposed in addition to the *ad valorem* assessment.

This scheme of taxation is similar to the scheme declared invalid by the Supreme Court in *Galveston, Harrisburg, etc., v. Texas,* 210 U. S. 217.

It is a scheme to reach the gross receipts of the railroad company in addition to taxing the property of the railroad company in North Carolina upon a full valuation of that property taken as a going concern.

The Court in *Choctaw, Oklahoma & Gulf v. Harrison,* 235 U. S., 292, said:

> "This very language imposes a gross revenue tax which shall be in addition to the taxes levied and collected upon an *ad valorem* basis. We cannot, therefore, conclude that the gross receipts were intended merely to represent the measure of value of property liable to a general assessment. Provision is made to determine that under a different basis."

In *Crew Levick v. Pennsylvania,* 245 U. S. 294, the Court says that it is in duty bound to determine the questions raised under the Federal Constitution upon its own judgment *of the actual operation and effect of any tax, irrespective of the form it bears or how it is characterized by the State court.* This statute, however, has not yet been passed upon by the Supreme Court of North Carolina, although the Income Tax Law is now being contested.

In the *Galveston* case, *supra,* the Court says:

> "We are of the opinion that the statute levying this tax does amount to an attempt to regulate commerce among the States. The distinction between a tax 'equal to' one per cent of gross receipts, and a tax of one per cent of the same, seems to us nothing except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. *On the contrary, we rather infer from the judgment of the State Court and from the argument on behalf of the State, that another tax on the property of the railroad is upon a valuation of that property taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an*

occupation tax and in no way helped by the words 'Equal to.'" (Italics ours.)

It seems to us, therefore, that this whole scheme of taxation must be taken into account in considering the legality of it, and, as it bears directly upon interstate commerce, and taxes the receipts derived therefrom and property used in interstate commerce, and property outside of the State of North Carolina, not used in interstate commerce in said State, it should be condemned and the assessment set aside.

PART EIGHT.

CONSTRUCTION OF TAX STATUTES.

In *Gould v. Gould,* 245 United States 154, Mr. Justice McReynolds, delivering the opinion of the Court, says:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen. *United States v. Wigglesworth,* 2 *Story,* 369, Fed. Cas. No. 16,690; *American Net & Twine Co. v. Worthington,* 141 U. S. 468, 474, 35 L. ed. 821, 824, 12 Sup. Ct. Rep. 55; *Benziger v. United States,* 192 U. S. 38, 55, 48 L. ed. 331, 338, 24 Sup. Ct. Rep. 189."

In *Forty-Two Broadway Company v. Anderson,* 209 Federal 991, in construing the income tax, the Court says:

> "The general rule in reference to statutes imposing taxes is that they are to be construed strictly against the government, and in case of any doubt as to their meaning they are to be given a liberal construction in favor of those subjected to taxation."

In *Southern Railway Company v. North Carolina Corporation Commission,* 97 Federal 513, a case from the Eastern District of North Carolina, decided November 4th, 1899, Circuit Judge Simonton says:

> "We are construing statutes imposing taxes and burdens on the taxpayer. In such the rule is changed. 'The highest power that a soverign—the lawmaking power—can confer is the power to tax, and every act conferring that power must express it plainly, and the act so expressing it must be strictly constructed.' *Suth.* St. Const. 459 *et seq.* In every case of doubt

such a statute is construed against the government, *U. S. v. Wigglesworth, 2 Story,* 369, Fed Cas. No. 16,690."

Judge Simonton then goes on to quote Lord Chancellor Cairns in *Partington v. Attorney General,* L. R. 4 H. L., 100, 102; which quotation is as follows:

> "As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, the crown, seeking to recover the tax, cannot bring the subject within the leter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an 'equitable construction,' certainly such a construction is not admissible in a taxing statute when you can simply adhere to the words of the statute."

In *United States v. Wigglesworth, supra,* Mr. Justice Story, in holding that the Revenue Act of 1841 did not levy a duty on indigo, says:

> "My reasons for this conclusion are these: In the first place, it is, as I conceive, a general rule in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government and in favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes clearly and expressly import. Revenue statutes are in no just sense remedial laws, or laws founded upon any permanent public policy, and there-

fore are not to be liberally construed. Hence, in the present case, if it be a matter of real doubt whether the intention of the act of 1841 was to levy a permanent duty on indigo, that duty will absolve the importer from paying the duty beyond the period when it would otherwise be free."

Cooley on Taxation, Third Edition, page 452.

In *Dwarris on Statutes,* pages 742, 749, the author says:

"It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. Acts of parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found, the construction must be in favor of the public, because it is a general rule that when the public are to be charged with a burden, the intention of the legislature to impose that burden must be explicitly and distinctly shown."

This language has been cited with approval by the Supreme Court of North Carolina in the case of *State v. Greene,* 35 Southeastern 462, the opinion being by Chief Justice Clark.

Tested, therefore, by these decisions the assessment is illegal and the taxes imposed are void.

PART NINE.

THE INJUNCTION SHOULD BE CONTINUED TO THE HEARING.

It appears from the affidavit of Charles J. Joseph (Record, p. 130), that the taxes paid by complainant to the various counties, cities and towns, in this State, for the year 1920, amounted to $353,663.84, of which $307,-789.53 was paid to the counties, and $45,874.31 to the various cities and towns. It further appears, however, from this affidavit that this complainant *has already paid for the year 1921,* the sum of $446,654.61, of which $393,-998.45 was paid to the counties, and $52,656.16 was paid to the cities and towns, being total of $92,990.77 which it has paid in taxes for the year 1921 already on the valuation of $34,645,345, which was agreed to at the time of the stipulation entered herein, *in excess* of the amount which it paid for taxes in the year 1920, *on the valuation of $50,867,800,* and if complainant is made to pay on the same valuation of $50,867,800, for 1921, it will have to pay the sum of $625,067.65, which is an increase of $271,-403.81, for the year 1921 over the year 1920, and if the assessment is to stand for the next three years it would amount to an increase of $820,211.43.

In *Harriman, et. al., v. Northern Securities Company, et. al.,* 132 Federal 464, 475, the Court says:

> "The case not being ripe for a final decision, the present application is for a preliminary injunction. The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties in-

volved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of the parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption be suffered by the complainant, through its refusal, the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would on the contrary assumption be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt, existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree as between the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. *Where, however, the object for which an injunction is sought, is the preservation of a fund in controversy or the maintenance of the status quo, until*

the question of right between the parties, can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. (Italics ours.) Its allowance in the latter case is a provisional measure, of suspensive effect and in aid of such relief, if any, as may finally be decreed to the complainant. These views are supported by abundant authority to which, were it not for the importance of the case, I should refrain from adverting. In *Russell v. Farley,* 105 U. S. 433, 438, 26 L. Ed. 1060, the Court through Mr. Justice Bradley said:

> "It is a settled rule of the Court of Chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. Kerr on Injunctions, 209, 210. And if the legal right is doubtful, either in point of law or of fact, the Court is always reluctant to take a course which may result in material injury to either party.'

"In *City of Newton v. Levis,* 79 Federal, 715, 25 C. C. A. 161, the Circuit Court of Appeals for the Eighth Circuit through Judge Sanborn, said:

> 'The granting or withholding of a preliminary injunction rests in the sound judicial discretion of the Court, and the only question presented by this appeal is whether or not the Court below erred in the exercise of that discretion, under the established legal principles which should have guided it. The propriety of its action must be considered from the standpoint of that Court. * * * The controlling reason for the existence of the right to issue a preliminary injunction is that the Court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before their

claims can be investigated and adjudicated. When the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond if the injunction is granted. A preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted. * * * The arguments and brief of counsel invite us to a consideration of the questions of law which must be finally determined upon a demurrer to the bill, or upon a final hearing of this case after answer. We have, however, found it unnecessary to decide these questions on this appeal, and we express no opinion upon them. They are of sufficient importance and difficulty to demand careful examination and deliberate consideration,' etc.

"In *Glascott v. Lang, 3 Myl. & C.* 451, 455, Lord Chancellor Cottenham said:

'In looking through the pleadings and the evidence, for the purpose of an injunction, it is not necessary that the Court should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the Court finds, upon the pleadings, and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity.'

"In *Hadden v. Dooley,* 74 Federal 420, 431, 20

C. C. A. 494, the circuit court of appeals for the second circuit through Judge Shipman said:

'When the questions which naturally arise upon the transactions make them a proper subject for deliberate examination, if a stay of proceedings will not result in too great injury to the defendants, it is proper "to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined" by evidence and proofs which have the merit of accuracy.'

"In *Great Western R. Co. v. Birmingham*, etc., R. Co., 2 *Phil.* Ch. 597, Lord Chancellor Cottenham said:—

'It is certain that the Court will in many cases interfere and preserve property in *status quo* during the pendency of a suit in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, an opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title: but it would embarrass the original purchaser in his suit against the vendor which the Court prevents by its injunction. * * * It is true that the Court will not so interfere if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the Court to decide upon the merits in favor of the plaintiff. If, then, this bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail. Is, then, the case stated by the bill so clear in favor of the defendants, and so inadequate to support the relief prayed by the bill, as to justify the Court in permitting it to be disposed of, and new titles or in-

terests to be introduced, before any decision can be obtained upon the case so made?'

"In *Shrewsbury v Chester R. Co. v. Shrewsbury R. Co.,* 1 Sim N. S. *410, *426, *427, *432, the Vice Chancellor, Lord Cranworth, said:—

'When the Court is called on to interfere to preserve property *pendente lite,* there are, I apprehend, two points on which the Court must satisfy itself. First, it must satisfy itself, not that the plaintiff has, certainly a right, but that he has a fair question to raise as to the existence of such right. * * * Where it is made out that there is a point to be decided which the plaintiff is fairly raising, still there is a further question, namely, whether interim interference, on a balance of convenience and inconvenience to the one party and to the other, is or is not expedient. Where the alternative is interference of probable destruction of the property, there, of course, the Court will be very ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant. But, where, on the other hand, the only evil to result from non-interference is, that the plaintiff may, by the contracts or deeds of the defendant, be retarded or embarrassed in his litigation, there the Court will be far more ready to listen to any suggestion of the defendant showing that interference during litigation will prejudice his rights.

* * *Although I am perfectly satisfied of the authority of this Court to issue an injunction, not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that may embarrass the plaintiff in his suit, and that the Court is entitled to do so whenever it sees there is a fair ground for litigation raised by the plaintiff, yet that right of the Court must be guided by a discretion not to exercise it where

it sees that on the balance of convenience and inconvenience between interim interference and non-interim interference the balance greatly preponderates in favor of the defendant and against the plaintiff.'

"In the above case a preliminary injunction was refused on the ground of the 'enormous preponderence of inconvenience in granting the injunction over any possible inconvenience in refusing it. The doctrine of the foregoing cases is contained in many others from which there is no occasion to quote. *Denver & R. G. R. Co. v. United States,* 124 Fed. 156, 59 C. C. A. 579; *Allison v. Corson,* 88 Fed. 581, 32 C. C. A. 12; *Buskirk v. King,* 72 Fed. 22, 18 C. C. A. 418; *Sanitary Reduction Works v. California Reduction Co.* (C. C. A.) 94 Fed. 693; *Southern Pacific Co. v. Earl,* 82 Fed. 690, 27 C. C. A. 185; *New Memphis Gas & Light Co. v. Memphis* (C. C.) 72 Fed. 952; *Indianapolis Gas Co. v. Indianapolis* (C. C.) 82 Fed. 245; *Georgia v. Brailsford,* 2 Dall. 402, 1. L. ed. 433.

"It does not appear, nor has it been claimed or intimated, that the granting of the preliminary injunction asked for would interfere with the operation of the Northern Pacific Railway Company and the Great Northern Railway Company, or either of them, or otherwise prove detrimental to the interests of the public. It undoubtedly would, during the continuance in force of the injunction, preclude the stockholders of the Northern Securities Company, or a considerable proportion of them, from directly or indirectly receiving dividends on the stock of either of the railway companies, unless under and by virtue of some voluntary and extrajudicial arrangement. But this Court has power to require the complainants as a condition precedent to the issuing of the injunction, a bond in such form and amount as fully to indemnify all persons who may ultimately be found entitled to such dividends against all loss or damage resulting from the suspension of their payment. On the other

> hand, the denial of a preliminary injunction would, if the complainants should ultimately prevail, render barren their victory so far as relief in this suit is concerned. * * * In view of the character of the questions involved in this case it would be highly inequitable that the complainants should, in advance of any final decision on the merits, be put in such a position as to be precluded, either wholly or in a large measure, from the realization and enjoyment of the fruits which should be theirs through the immediate result of a final decree in the present case, should it ultimately be determined in their favor."

Bearing in mind, therefore, the rule laid down in the *Harriman* case that the legitimate object of a preliminary injunction is the preservation of property or rights in controversy until the decision on full and final hearing upon the merits, and, further, that where the sole object for which the injunction is sought is the preservation of a fund in controversy or maintenance of the *status quo*, until the question between the parties can be determined on final hearing, and in view of the fact that it may be impossible for the complainant to recover back its money paid into the State treasury; it would be highly inequitable that complainant should be put in such a position as in the event that it wins the case, it will be precluded from recovering the fruits of its victory. A denial of the injunction in this case will mean loss of the entire money to the plaintiff that will have to be paid to the State and a multiplicity of suits to recover that which will have to be paid to the counties, towns, and townships. The inconvenience (because there can be no loss) to the defendants would be slight. In fact the figures above show that this railroad company has paid nearly one hundred thousand dollars ($100,000.00) more in taxes already on this valuation of $34,645,345 this year than it did last year on the valuation of $50,867,800. Certainly, in this case the *status*

quo should be preserved until the rights of the parties may be determined.

> *Louisville & Nashville Railroad Company v. Bosworth,* 209 Federal 380.

That case was a tax case from Kentucky. In determining the question of the injunction the Court examined all of the leading cases of the Supreme Court of the United States and of the Federal Court, and, among other things, the Court says, page 384:

> "The plaintiff, therefore, is entitled to the relief it seeks if it does no more than make good the other claim, to-wit, that the board in making the assessment did not follow the statute."
>
> *Coleman v. Howell* (N. C.), 42 Southeastern 554,
> *Purnell v. Page* (N. C.), 45 Southeastern 534,
> *Cobb v. Clegg* (N. C.), 49 Southeastern 80.

In the last case cited, Mr. Justice Walker, writing the opinion, after referring to the distinction between common and special injunctions, says:

> "Not so with a special injunction, which is granted for the prevention of irreparable injury, when the preventive aid of the Court of Equity is the ultimate and only relief sought and is the primary equity involved in the suit. In the case of special injunctions the rule is not to dissolve upon the coming in of the answer, even though it may deny the equity, but to continue the injunction to the hearing, if there is probable cause for supposing that the plaintiff will be able to maintain his primary equity, and there is a reasonable apprehension of irreparable loss unless it remains in force, or if, in the opinion of the Court, it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined. It is generally proper, when the parties are at issue concerning the equitable or legal right, to grant an interlocutory injunction to preserve the right in *status quo* until the determination of the controversy, and espe-

cially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefore in the first instance, will virtually decide the case upon its merits, and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case. The principles we have attempted to state are, we think, well supported by the authorities upon the subject. 1 High on Injunction (3rd Ed.), p. 6; *Jarman v. Sanders*, 64 N. C. 367; *Heilig v. Stokes*, 63 N. C. 612; *Blackwell Durham Tobacco Co. v. McElwee*, 94 N. C. 425; *Purnell v. Daniel*, 43 N. C. 9. *Bispham's Eq.* (6th Ed), p. 405. The cases of *Marshall v. Commissioners*, 89 N. C. 103; *Lowe v. Commissioners*, 70 N. C. 532, and *Capehart v. Mhoon*, 45 N. C. 30, would seem to be directly in point. In the first of these cases the Court says:

> 'The injunctive relief sought in this action is not merely auxiliary to the principal relief demanded, but it is the relief, and a perpetual injunction is demanded. To dissolve the injunction, therefore, would be practically to deny the relief sought and terminate the action. This the Court would never do where it may be that possibly the plaintiff is entitled to the relief demanded. In such cases it will not determine the matter upon the preliminary hearing upon the pleadings and *ex parte* affidavits, but it will preserve the matter intact until the action can be regularly heard upon its merits. Any other course would defeat the end to be attained by the action.'

"Mr. Justice Bynum, for the Court, in the second case cited, says:

> 'The injunctive relief sought in this action is not auxiliary to another and main relief but is the main relief itself and the object of the action, and therefore the dissolution of the injunction would be equivalent to a dismissal of the action. In such cases, where a reasonable doubt exists in the mind of the

Court whether the equity of the complainant is sufficiently negatived by the answer, the Court will not dissolve the injunction, but continue it to the hearing. Much must depend upon the sound discretion of the Court to whom the question of dissolution is referred.'

"While the principle as stated in the last quotation is in itself sufficient to sustain our decision, we think the learned and able justice had in mind the rule of practice in the cases of a common injunction, which was dissolved upon the answer, unless the equity was confessed, or the answer was evasive, or the equity was not sufficiently denied. *Capehart v. Mhoon, supra.* This will appear clearly from the following language of the Court, speaking by Nash, J., in *Troy v. Norment*, 55, N. C. 318:

'In applications for special injunctions (and this is such a one), the bill is read as an affidavit to contradict the answer; and where they are in conflict, and the injury to the plaintiff will be irreparable if the relief be not granted, the injunction will not be dissolved on motion, but will be continued to the hearing to enable the parties to support by proofs their respective allegations. Justice demands this course. When there is nothing before the Court but oath against oath, how can the chancellor's conscience be satisfactorily enlightened?'

"It will also appear by what is said by Pearson, J., for the Court, in *Purnell v. Daniel*, 43, N. C. 9:

'This is not the case of an ordinary or common injunction, in aid of and secondary to another equity; but it is the point in the cause—it is to prevent irreparable injury, as is alleged—and to dissolve the injunction decides the case, for to dissolve it, allows the act to be done. By way of illustration, take the case of an injunction to stay waste in cutting down ornamental or shade trees. If the injunction be dissolved on bill and answer, and the trees are cut down, the damage is done, for the trees can not be made to grow again. To dissolve this injunction before

hearing the cause on proof, the defendant must show that the plaintiff has no case fit to be heard; and if, from the answer, it appears that there is any question of doubt, on a matter that should be further inquired into, the injunction will be continued until the hearing.' "

The Supreme Court of North Carolina in this case has applied the same rule that all of the other Courts have applied. The rule is plain, simple and laid down for the purpose of doing justice between the parties. The same rule was also laid down by Chief Justice Clark in *Hyatt v. De Hart,* 140 N. C. 270; by Mr. Justice Hoke in *Tise v. Whitaker Harvey Company,* 57 Southeastern 210; in *Combs v. Adams,* 63 Southeastern 186; and, again, by Mr. Justice Walker in *Person v. Person,* 70 Southeastern 752.

The eminent counsel for the defendants with much seriousness endeavored to impress upon the Court below that to declare a statute of North Carolina to be unconstitutional, or to enjoin the exercise of the taxing powers, was a matter of most grave concern. The Supreme Court of North Carolina, through Mr. Justice Connor, in *State v. Williams,* 61 Southeastern 61, in holding a statute unconstitutional, says, in quoting from the opinion of Mr. Justice Brewer, in *Stearns v. Minn.* 179 U. S. 241:

> "Whatever the people, framing their organic act, have declared to be the limits of legislative power, and the modes in which that power shall be exercised, must always be recognized by the Courts, state and national, as obligatory."

He further says:—

> "It is the right of the citizen, when called to the bar of the Court, to appeal to the Constitution and demand that the Court declare whether the statute which he is charged with violating be 'the law of the land.' To make this right of any value or protection to the citizen it must be the duty of the Court to declare its judg-

ment thereon. To deny this is to keep the promise to the ear and break it to the hope—to make of none effect the declaration that 'ours is a government of law and not of men.' 'It will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon this Court than to exert its full authority to prevent all violations of the principles of the Constitution.' "

The judges of the Supreme Court of North Carolina have unhesitatingly declared acts of the Legislature void, when in fact they were in violation of the principles of constitutional government, as laid down in the Constitution of North Carolina, and this from the time of *Bayard v. Singleton,* 1 North Carolina, 42, decided in 1787, up to the present time.

As late as 1919, in *Southern Railway Company v. Cherokee County,* 97 Southeastern 758, the history of the declaration by the Supreme Court of North Carolina of laws as invalid whenever in violation of the terms of the Constitution, was set forth by Mr. Justice Allen, in the opinion of the Court, and in the concurring opinion by Mr. Justice Walker, and in that case, which was a tax case, the Court unhesitatingly declared the statute of the Legislature unconstitutional.

Seip v. Wright, 91 Southeastern 359,
Herndon v. Durham & Southern Railroad, 77 Southeastern 683.

We think that sufficient has been said to show the Court that we are entitled by all the rules of equity to have this injunction continued to the hearing.

THOMAS W. DAVIS,
Solicitor for Appellant.

GEO. B. ELLIOTT,
HARRY SKINNER,
H. W. WHEDBEE,
Of Counsel.

Wilmington, N. C.,
September 23, 1922.

APPENDIX

Extracts from Constitution of North Carolina:

Article V.

"**Section 3. Taxation Shall be by Uniform Rule and ad Valorem:** Exemptions.—Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money * * * The General Assembly may also tax trades, professions, franchises and incomes." etc.

"**Section 6. Taxes Levied for Counties.**—The total of the state and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act: Provided, this limitation shall not apply to taxes levied for the maintenance of the public schools of the state for the term required by article nine, section three, of the constitution: Provided, further, the state tax shall not exceed five cents on the one hundred dollars value of property."

Article VII.

"**Section 9.**—All taxes levied by any county, city, town or township shall be uniform and *ad valorem* upon all property in the same except property exempted by this Constitution."

Extracts from Consolidated Statutes of North Carolina:

Section 7979. Remedy of Taxpayer for unauthorized

tax.—Unless a tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part, nor to restrain the sale of any property for the non-payment thereof; nor shall any court issue any order in claim and delivery proceedings or otherwise for the taking of any personalty levied on by the sheriff to enforce payment of such tax or assessment against the owner thereof. Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff; but if, at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state or of the county, city, or town, for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such county, city, or town for the amount so demanded, including in his action against the county both state and county tax; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefore, with interest, and the same shall be collected as in other cases. The amount of state taxes for which judgment shall be rendered in such action shall be refunded by the state treasurer.

EXTRACTS FROM MACHINERY ACT OF NORTH CAROLINA.

Ch. 38, Public Laws 1921

Sec. 28 (*a*). *County boards to review valuation of real estate.*

County board of review.

The board of county commissioners and the county board of appraisers and review, heretofore appointed under chapter eighty-four of the Public Laws of one thousand nine hundred and nineteen (any vacancy which may have occurred to be filled by appointment of the board of county commissioners), shall

Day of meeting.

meet jointly in each county on the first Tuesday after the first Monday in April, one thousand nine hundred and twenty-one, as a county board of review, to determine if the value of real property as heretofore appraised and assessed in the county as a whole is in excess of the fair value of such property at the time of meeting of such board. The chairman of the

Organization of boards.

board of county commissioners shall be the chairman of the county board of review as thus constituted, and the clerk of the board of county commissioners shall be secretary of the said board. The said board

Inquiry and investigations as to values.

shall make proper inquiry and investigation into the existing values of real property as compared with the assessed and appraised values thereof in the several cities, towns, and townships of the county; and

Findings.

if it shall find that the assessed value of such property is in excess of the actual value, it shall find the average percentage of such excess in the county as a whole, or in the several cities, towns, and townships, and shall report its finding so made to the

Report to State Tax Commission

State Tax Commission not later than the twentieth day of April, one thousand nine hundred and twenty-

Valuation.

one. The values so reported shall be the values at which the property shall be assessed for taxation, unless and until the same have been changed and revised by the State Tax Commission and certified to

the board of county commissioners of such county, which shall be done not later than the first day of July, one thousand nine hundred and twenty-one.

Sec. 28 (*b*). *Specific complaints.*

Specific complaints.

The board of county commissioners of the several counties shall have and exercise authority to hear and determine specific complaints of over-valuation or under-valuation of any particular tracts of real property, and after the general equalization order provided for in the preceding subsection has been made, any person who owns property subject to taxation, and who finds that said property stands assessed for taxation, after such equalization order has been made, at an amount in excess of the actual value of such property on the first day of May, one thousand nine hundred and twenty-one, may have the right to have the same reassessed and reappraised by the said board, by filing with the clerk of the board of county commissioners, some time during the month of May, one thousand nine hundred and twenty-one, an application in form and substance as follows:

Application for reassessment.

Time for application.

To the Board of County Commissioners:

Form of Application.

.....County.

I hereby make application for the reassessment of the real property hereinafter described, for the reason that the said property is now assessed in excess of its actual value on the first day of May, one thousand nine hundred and twenty-one, and do hereby certify that in my best judgment the actual value of said property on that date was as it is stated herein to be:

Location .....
Condition .....
Acreage .....
Assessed Value .....
Actual value May 1, 1921.....

.....,
(*Signature of Complainant.*)

Complaint of undervaluation.

Review initiated by board.

Any citizen of the county may file complaint of the under-valuation of any real property in the county, or the board may of its own motion revise the valuation of any property that it finds to be valued at more or less than the actual value of such property on the first day of May, one thousand nine hundred and twenty-one.

Investigation of complaints.

Reports and recommendation.

Action by county commissioners.

The county board of commissioners may appoint the county auditor or any resident freeholder of the county, who has general knowledge of the value of the real property of the county, to investigate any and all complaints filed under the provisions of this section, and make report and recommendations to the said board as to the true value in money of such properties. The county board of commissioners shall thereupon approve or revise such recommendations, and shall, not later than the fifteenth day of July, one thousand nine hundred and twenty-one, make report to the State Tax Commission of the increases and reductions in the valuation of specific properties made under authority of this section.

Report to State Tax Commission.

General revision of values.

Sec. 28 (*c*). If the board of county commissioners of any county, at their regular monthly meeting on the first Monday in April, one thousand nine hundred and twenty-one, shall be of the opinion that the valuation of real estate in such county is so unequal as between the owners of real property in such county as to require a more general revision of assessments than is practicable to be made under the provisions of subsections (*a*) and (*b*) of this section, or the value of real property as heretofore appraised in such county as a whole is in excess of the present actual value of such property, it may by resolution so find and order that such revision be made. In the event such order is made, it shall be in lieu of the remedies provided in subsections (*a*) and (b) of this section, and the board of county commissioners shall appoint a board of review, composed of three resident freeholders, who have general knowledge of the value of real estate in such county, and such board of review may appoint such number

Order in lieu of other remedies.

Board of review.

of assistants as in their judgment is necessary to complete such revision, not later than the first day of July, one thousand nine hundred and twenty-one. The said board shall take and subscribe to an oath to perform their duties according to the provisions of this act according to the best of their ability, and shall give notice by public advertisement that the board, or one of its members or assistants, will attend at least one day in each township, and as long as shall be necessary to hear evidence as to the true value of the real property therein, and of any property over-valued or under-valued; and the said board shall proceed as speedily as possible to hear and determine what the present true value thereof is, and to make such general review and revision of the assessed value of real property in such county as it finds is necessary to be made, to the end that the same may be fairly and equally assessed at its present actual value in money. A complete abstract of such revised assessment, by townships, giving average value per acre, and value of town lots, and the value as a whole, shall be made to the board of county commissioners of such county and to the State Tax Commission, not later than the fifteenth day of July, one thousand nine hundred and twenty-one, and shall be subject to the authority of the State Tax Commission as a State Board of Equalization, so as to preserve a proper equalized value of real property in the several counties. The board of county commissioners shall fix the expense that may be incurred under this section, such expense to be borne by the county.

Assistants to board of review.

Board to be sworn.

Advertisement.

Determination of value.

Abstract to county commissioners.

Authority of State Tax Commission.

Expense of review.

Sec. 28 (*d*). The report of the board of county commissioners, made pursuant to section twenty-eight (*b*), and the abstracts as reported by the board of review, under section twenty-eight (*c*), shall be the basis for the assessment of taxes, unless and until the same are changed by the State Tax Commission on or before the first day of September, one thousand nine hundred and twenty-one, and the said State Tax Commission shall, on or before the first

Basis for assessment of taxes.

State Tax Commission to certify findings.

day of September, one thousand nine hundred and twenty-one, certify down to the board of county commissioners of the several counties its findings and conclusions upon said report and abstracts.

Access to questionnaires and records.

Sec. 28 (*e*). In any proceedings under this act the county board of review or county board of commissioners, or any of their representatives, shall have access to the questionnaries filed by the owners of real property in the county under chapter eighty-four of the Public Laws of one thousand nine hundred and nineteen, the tax rolls for the several townships and any other records pertaining thereto.

State Tax Commission to exercise authority of supervision.

It shall be the duty of the State Tax Commission to exercise the authority of supervision herein imposed, to the end that, as nearly as may be, property of all classes in all counties of the State may be fairly and equally valued in accordance with the requirements of the Constitution and the provisions of this act, and if in any case in doubt as to whether changes in valuation in any county should be approved, it shall have the authority, and it shall be its duty, to make or cause to be made such investigation as it may deem necessary to determine the facts and reach a just conclusion.

Investigation.

"Actual value."

The words "actual value," as used in the several subdivisions of this section, shall be held to mean the true and actual value of the property if sold in the manner in which such property is usually sold, but not by forced sale thereof, and shall be held and deemed to mean what the property would bring at cash sale when sold in such manner as such properties are usually sold.

Appeal to State Tax Commission.

Sec. 28 (*f*). Any taxpayer in any county may appeal, within thirty days, to the State Tax Commission from any finding by the board of county commissioners.

Application for review by State Tax Commission.

Sec. 28 (*g*). Any taxpayer owning property assessed originally by the State Tax Commission may make application to the State Tax Commission for a review of the assessment of its property in the same manner herein provided for complaint

by property owners before the county boards, and the State Tax Commission may hear and determine such complaints.

Hearing and determination.

Sec. 61. *Railroads.*

The commissioners selected from time to time under authority to establish the North Carolina State Tax Commission shall constitute a board of appraisers and assessors for railroad, canal, and steamboat companies, and other companies exercising the right of eminent domain.

Board of assessment for railroad, canal, steamboat, and other companies.

Sec. 62. *Railroads.*

The president, secretary, superintendent, or other principal accounting officer within this State, of every railroad, telegraph, telephone, street railway company, whether incorporated by the laws of this State or not, shall,, at such date as real estate is required to be assessed for taxation, return to the said commission for assessment and taxation, verified by the oath or affirmation of the officer making the return, all the following described property belonging to such corporation within this State, viz: The number of miles of such railroad lines in each county in this State, and the total number of miles in this State, including the roadbed, right of way, and superstructures thereon, main and sidetrack, depot buildings, and depot grounds, section and tool houses, and the land upon which situated and necessary to their use; water stations and land, coal chutes and land, and real estate and personal property of every character necessary for the construction and successful operation of such railroad, or used in the daily operation, whether situated on the charter right of way of the railroad or on additional land acquired for this purpose, except as provided below, including, also, if desired by the State Tax Commission, pullman or sleeping cars or refrigerator cars owned by them or operated over their lines: *Provided, however,* that all machine and repair shops, general office buildings, storehouses, and contents located outside of the right of

Companies to file returns.

Date of return.

Details of returns.

Proviso: Property listed locally.

way, and also real and personal property other than the property as returned above to the State Tax Commission, shall be listed for purposes of taxation by the principal officers or agents of such companies with the list-takers of the county where the real and personal property may be situated in the manner provided by law for the listing and valuation of real and personal property. A list of such property shall be filed by such company with the State Tax Commission. It shall be the duty of the register of deeds, if requested so to do by the State Tax Commission, to certify and send to the said commission a statement giving a description of the property mentioned in the foregoing proviso, and showing the assessed valuation thereof, which value shall be deducted from the total value of the property of such railroad company as arrived at by the commission, in accordance with section sixty-six, before the apportionment is made to the counties and municipalities. The registers of deeds shall also certify to the commission the local rate of taxation for county purposes as soon as the same shall be determined, and such other information obtained in the performance of the duties of their office as the said commission shall require of them; and the mayor of each city or town shall cause to be sent to the said commission the local rate of taxation for municipal purposes.

List filed with State Tax Commission.

Local assessments certified to State Tax Commission.

Local tax rate.

Other information.

Rate of municipal tax.

Sec. 62a. *Railroad companies required to file maps, etc.*

Every railroad company operating in this State shall also be required to file with the State Tax Commission a map or blueprint showing the location within the corporate limits of every incorporated city or town of its main line of road, and its length, together with location of its right of way, not exceeding one hundred feet in width, and the location and value of all real estate owned by any such company within the limits of any such city or town, and not included in the right of way so designated. Every such company shall also report the value of any and all buildings and structures within the limits of any such city or town,

Railroad companies to file maps showing location and property in towns.

Values reported.

whether on or off its right of way, and the commission shall find the value of all such real estate, buildings, and structures, and shall certify to such city or town the value of same, in addition to the value per mile of so much of its main line as may be located within such city or town, for *ad valorem* taxation.

Tax commission to find values and certify to towns.

Sec. 63. *Railroads.*

Rolling stock.

The movable property belonging to a railroad company shall be denominated for the purpose of taxation "rolling stock." Every person, company, or corporation owning, constructing or operating a railroad in this State shall, in the month of May, annually return a list or schedule to the State Tax Commission, which shall contain a correct detailed inventory of all the rolling stock belonging to such company, and which shall distinctly set forth the number of locomotives of all classes, passenger cars of all classes, sleeping cars and dining cars, express cars, horse cars, cattle cars, coal cars, platform cars, wrecking cars, pay cars, hand cars, and all other kinds of cars, and the value thereof, and a statement or schedule, as follows: (1) The amount of capital stock authorized and the number of shares into which such capital stock is divided; (2) the amount of capital stock paid up; (3) the market value, or if no market value, then the actual value of shares of stock; (4) the length of line operated in each county and total in the State; (5) the total assessed value of all tangible property in the State; (6) and, if desired, all the information heretofore required to be annually reported by section five thousand two hundred and ninety-one of the Revisal. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the commission, and with reference to amounts and value on the first day of May of the year of which the return is made.

List of rolling stock to be returned.

Details.

Schedule.

Amount of capital and number of shares.

Value of shares.

Length in each county and total for State.

Assessed value of tangible property.

Other information.

Form of schedule.

Date.

Sec. 64. *Tangible and intangible property assessed separately.*

Determination of value of tangible property.

(*a*) At such dates as real estate is required to be assessed for taxation, the said commission shall first determine the value of the tangible property of each division or branch of such railroad of rolling stock and all other physical or tangible property. This value shall be determined by a due consideration of the actual cost of replacing the property, with a just allowance for depreciation on rolling stock, and also of other conditions, to be considered as in the case of private property.

Considerations governing value.

Valuation of franchise.

(*b*) They shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted), as evidenced by the market value of all capital stock, certificates of indebtedness, bonds, or any other securities, the value of which is based upon the earning capacity of the property.

Considerations determining value.

Tax value of property.

Apportionment.

(*c*) The aggregate value of the physical or tangible property and the franchise as thus determined, shall be the true value of the property for the purpose of an *ad valorem* taxation, and shall be apportioned in the same proportion that the length of such road in each county bears to the entire length of such division or branch thereof; and the State Tax Commission shall certify, on or before the first day of September, to the chairman of the county commissioners and the mayor of each city or incorporated town the amount apportioned to his county, city or town; all taxes due the State from any railroad company shall be paid by the treasurer of each company directly to the State Treasurer within thirty days after the first day of July of each year; and upon failure to pay the State

Value certified to counties and towns.

State taxes paid to State Treasurer.

Treasurer as aforesaid, he shall institute an action to enforce the same in the county of Wake or any other county in which such railroad is located, adding thereto twenty-five per centum of the tax. The board of county commissioners of each county through which said railroad passes shall assess against the same only the tax imposed for county, township, or other taxing district purposes, the same as is levied on other property in such county, township, or special taxing districts.

Action for collection.

Penalty.

Local assessments.

Sec. 65. *Railroads.*

When any railroad has part of its road in this State and part thereof in any other State, the said commission shall ascertain the value of railroad track, rolling stock, and all other property liable to assessment by the State Tax Commissioner of such company as provided in the next preceding section, and divide it in the proportion to the length such main line of road in this State bears to the whole length of such main line of road, and determine the value in this State accordingly: *Provided,* the commission shall, in valuing the fixed property in this State, give due consideration to the character of roadbed and fixed equipment, number of miles of double track, the amount of gross and net earnings per mile of road in this State, and any other factor which would give a greater or less value per mile of road in this State than the average value for the entire system. On or after the first Monday in July the said commission shall give a hearing to all the companies interested, touching the valuation and assessment of their property. The said commission may, if they see fit, require all argument and communications to be presented in writing.

Proportional valuation of interstate railroads.

Proviso: Considerations in valuing tangible property.

Hearing on valuation and assessment.

Commission may require arguments and communications in writing.

EXTRACTS FROM
REVENUE ACT OF NORTH CAROLINA
Ch. 34, Public Laws 1921.

Sec. 3. *State taxes.*

No tax on property for State.

Tax for State expenses. Appropriations.

No tax on any property in the State shall be levied for any of the uses of the State Government. The taxes hereinafter levied in this act are for the expenses of the State Government, the appropriations to its educational, charitable, and penal institutions, pensions for Confederate soldiers and widows, the interest on the debt of the State, an equalizing fund for public schools, and other specific appropriations made by law, and shall be collected and paid into the general fund of the State Treasurer.

SCHEDULE C

Defining taxes embraced in schedule.

Sec. 76. *Defining taxes embraced in this schedule.* The taxes embraced in this schedule shall be listed and paid as specially herein provided, and shall be for the privilege of carrying on the business or doing the act named; and, if a corporation, shall be a tax for the continuance of its corporate rights and privileges given under its charter, if incorporated in this State; or by reason of any act of domestication, if incorporated in another State, and shall be subject to other regulations mentioned in section twenty-six under Schedule B.

Sec. 77. *Privilege tax on chair and sleeping cars.*

Chair and sleeping-car companies to report receipts.

Every company operating chair cars and sleeping cars on which extra fare is charged shall make report to the State Auditor on or before the first day of October for the year one thousand nine

hundred and twenty, and on or before the thirtieth day of July annually thereafter of the gross receipts collected from passengers transported between points in this State for the preceding year ending the thirtieth of June, which shall be verified by the oath of the secretary and treasurer of such company, and the said State Auditor shall certify said amount to the State Treasurer.

Verification.

The annual license tax for operating such chair and sleeping cars within the State shall be three per cent (3%) of the gross earnings for the previous year. The tax imposed by this section shall be paid to the State Treasurer at the time of making the report provided for herein. No county, city or town shall impose any tax under this section.

License tax.

Tax paid to treasurer.

Sec. 78. *Obsolete.*

Sec. 79. *Privilege tax on express companies.*

That every express company doing business in this State shall, on or before the thirtieth day of July in each year, make and return to the Corporation Commission a statement of the total number of miles of railroad lines over which such express company operates in this State; the said Corporation Commission shall certify the same to the State Treasurer as a basis for assessment and collection of the tax levied in the following schedule:

Returns of express companies.

Sec. 79a. *Rate of taxation.*

Each express company doing business in this State shall pay to the State Treasurer an annual privilege or license tax as follows: Any such company which earned from its express transportation business not more than six per cent upon its capital invested the previous calendar year shall pay at the rate of five dollars ($5) per mile. Any such company which so earned as much as seven per cent and less than eight per cent upon its capi-

Rate of tax.

On companies earning not more than six per cent.

Seven per cent and less than eight.

tal invested the previous calendar year shall pay at the rate of six dollars ($6) per mile. And any such company which so earned eight per cent or more upon its capital invested the previous calendar year shall pay at the rate of seven dollars ($7) per mile. Any such company not having had previous earnings shall pay at the rate of five dollars ($5) per mile: *Provided,* that no county shall levy any tax under this section. There may be levied and collected by every incorporated municipality in the State of North Carolina from each express company, for the privilege of doing business within the municipal limits of said incorporated municipalities, a privilege or license tax, to be computed and based on the population of said municipalities as follows: Incorporated municipalities having a population of five hundred people or less, five dollars per annum; incorporated municipalities having a population of five hundred people and not exceeding one thousand people, ten dollars per annum; incorporated municipalities having a population of one thousand and not exceeding five thousand people, twenty dollars per annum; incorporated municipalities having a population of five thousand and not exceeding ten thousand people, thirty dollars per annum; incorporated municipalities having a population of ten thousand and not exceeding twenty thousand people, fifty dollars per annum; incorporated municipalities having a population of exceeding twenty thousand people, seventy-five dollars per annum: *Provided further,* that nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce, or upon any business transacted for the Federal Government.

Eight per cent or more.

Companies not having previous earnings.

Proviso: No county tax.

Municipal tax.

Towns of 500 or less.

500 and not exceeding 1,000.

1,000 and not exceeding 5,000.

5,000 and not exceeding 10,000.

10,000 and not exceeding 20,000.

Exceeding 20,000.

Proviso: Interstate commerce and Federal government.

Sec. 80. *Telegraph companies.*

Each and every person, firm, or corporation operating within this State the apparatus necessary to communication by telegraph shall pay, for the privilege of engaging in such business, to the State

Telegraphic companies.

an annual license tax of five dollars per mile for each pole mile of such telegraph line owned or operated by them within the State, as shown by report of such telegraph company to the Tax Commissioners under section forty-eight of the Machinery Act, and it shall be the duty of the Tax Commissioners to certify to the State Auditor the number of miles of line operated by such telegraph company in this State, and it shall be the duty of the State Treasurer to collect the tax as herein levied upon the basis of mileage as reported: *Provided,* that nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce or upon any business transacted for the Federal Government: *Provided,* that no county shall levy any additional tax under this section, but towns may levy the following taxes: Those having a population of one thousand and not exceeding five thousand, ten dollars; from five thousand to ten thousand, fifteen dollars; from ten thousand to twenty thousand, twenty dollars; over twenty thousand, fifty dollars.

Mileage reported to Auditor.
Treasurer to collect tax.
Proviso: Interstate commerce and business of Federal government.
Proviso. No county tax.
Town tax.

Sec. 81. *Telephone companies.*

On every telephone company doing business in this State, an annual tax of three per cent on the gross receipts of such telephone company within the State, reckoning for the purpose of ascertaining the amount of such gross receipts the proportion of the interstate business done within the State which is properly credited to North Carolina: *Provided,* that if any such company shall file with the Board of State Tax Commissioners a statement, signed and sworn to by its principal officer in this State, showing that at least one-quarter of the entire assets of his company, when his company has assets, are invested in and are maintained in any or all of the following securities or property, viz.; bonds of this State or of any county, city, or town of this State, or any property situated in this State and taxable therein, then the tax shall be one and one-half per

Telephone companies.
Tax on receipts.
Ascertainment of receipts.
Proviso: Investments reducing tax.

cent; and if the amount so invested shall be one-half of its total assets the tax shall be two per cent; and if the amount so invested shall be three-fourths of its total assets the tax shall be one per cent. The superintendent, general manager, or other chief officer of every such company shall make and return, under oath, to the Treasurer of the State, within ten days after the first day of January, April, July, and October of each year, the amount of the gross receipts of the company for the quarter ending on the first day of the month immediately preceding, and pay to the Treasurer the tax herein imposed at the time of making such return. It shall be the duty of each sheriff to report to the Treasurer any such company doing business in his county. In case of default of such return and payment of tax, the company shall pay a penalty of one thousand dollars, to be collected by such sheriff as the Treasurer of the State shall designate, by distress or otherwise: *Provided further,* no county, city, or town shall be allowed to impose an additional tax, license, or fee provided in this section, except the *ad valorem* tax.

Returns of gross receipts.

Payment of tax.

Sheriff to report companies doing business in his county.

Penalty for default in return or payment.

Proviso: No County, city, or town tax.

Franchise tax.

Sec. 82. *Franchise tax on corporations.*

Domestic corporations. Between the first day of May and the first day of July, one thousand nine hundred and thirteen, and annually thereafter during the month of May, each corporation organized under the laws of this State shall make a report in writing to the State Tax Commission in such form as the Commission may prescribe.

Domestic corporations to report annually.

Sec. 82 (1). Such report shall be signed and sworn to before an officer authorized to administer oaths, by the president, vice-president, secretary, or general manager of the corporation, and forwarded to the Commission.

Report to be verified.

Report to contain:

Sec. 82 (2) Such report shall contain—

Name of corporation.

(*a*) The name of the corporation.

Principal office.

(*b*) The location of its principal office.

Names and address of officers.

(*c*) The name of the president, secretary, treasurer, and members of the board of directors, with postoffice addresses of each.

Date of election.

(*d*) The date of the annual election of officers.

(*e*) The amount of authorized capital stock and the par value of each share.

Amount of stock and par value of shares.

(*f*) The amount of capital stock subscribed, the amount of capital stock issued and outstanding, and the amount of capital stock paid up.

Amount of stock subscribed, issued and outstanding, and paid up.

(*g*) The nature and kind of business in which the corporation is engaged, and its place or places of business.

Nature and kind of business. Places of business.

(*h*) The change or changes, if any, in the above particulars made since the last annual report.

Changes since last report.

Sec. 82 (3). Upon the filing of the report provided for in the last three preceding subsections, the Commission, after finding such report to be correct, shall, on or before the first Monday of August, determine the amount of the subscribed or issued and outstanding capital stock of each such corporation. On the first Monday in August, or as soon thereafter as practicable, the Commission shall certify the amount so determined by it to the Auditor of the State, who shall charge for collection on or about August fifteenth, as herein provided, from such corporation, a fee of one-tenth of one per cent upon its subscribed or issued and outstanding capital stock, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the Treasurer of the State on or before the first day of the following October. No county, city, or town shall have the power to levy any franchise tax under this section.

Commission to determine subscribed or issued and outstanding stock.

Certificate to Auditor.

Fee charged for collection.

Minimum of fee.

Fee payable to Treasurer.

No county, city, or town tax.

Sec. 82 (3½). That where a report required to be made under the provisions of this section to the State Tax Commission by any domestic corporation shows capital stock issued and outstanding by any such company to be less than one-half of the assessed value for taxation of all the property of such company in this State for the year in which report is made, or the report of any foreign corporation shows the proportion of the capital stock of such foreign corporation apportionable to this State under the rules laid down in section 82 of this act to be less than one-half of the assessed

Calculation of franchise tax when stock is less than one-half of value of property.

value for taxation of all the property of such company in this State for the year in which such report is made, the measure of the extent to which the corporate franchise of any such corporation is being used and the amount of franchise tax to be paid by any such corporation shall be calculated with reference to the sum of one-half of the total assessed value of all the property of such corporation in this State.

Reports from foreign corporations.

Sec. 82 (4). *Foreign corporations.* Annually during the month of July, each foreign corporation doing business in this State, and owning or using a part or all of its capital or plant in this State, and subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report in writing to the Commission in such form as the Commission may prescribe.

Verification of report.

Sec. 82 (5). Such report shall be signed and sworn to before an officer authorized to administer oaths, by the president, vice-president, secretary, superintendent, or managing agent in this State and forwarded to the Commission.

Report to contain:

Sec. 82 (6). Such report shall contain—

Name and domicile of corporation.

(*a*) The name of the corporation and under the laws of what State or county organized.

Principal office.

(*b*) The location of its principal office.

Name and address of officers.

(*c*) The names of the president, secretary, treasurer, and members of the board of directors, with the postoffice address of each.

Date of election.

(*d*) The date of the annual election of officers.

Amount of capital and par value of shares

(*e*) The amount of authorized capital stock, and the par value of each share.

Amount of stock subscribed, issued, and paid up.

(*f*) The amount of capital stock subscribed, the amount of capital stock issued, and the amount of capital stock paid up.

Nature of business and places of business.

(*g*) The nature and kind of business in which the company is engaged, and its place or places of business, both within and without the State.

(*h*) The name and location of its office or

offices in this State, and the name and address of the officers or agents of the corporation in charge of its business in this State.

Location of offices in this State and name and address of agent in charge.

(*i*) The value of the property owned and used by the company in this State, where situated, and the value of the property owned and used outside of this State, and where situated.

Value and location of property in this State and outside this State.

(*j*) The volume of business done by the company in this State.

Volume of business in this State.

(*k*) The volume of business done by the company outside of the State, and where the said business is done.

Volume of business outside of State.

(*l*) The change or changes, if any, in the above particulars, made since the last annual report.

Changes since last report.

Sec. 82 (6½). *Railroads.* Every railroad company doing business in this State shall annually on or before the thirtieth day of July make and return to the State Tax Commission, in such form and upon such blanks as shall be furnished by the State Tax Commission, and giving such information as the State Tax Commission shall require, for the purpose of carrying out the provisions of this section, and upon which report the State Tax Commission shall ascertain and certify to the State Auditor the value upon which the amount of taxes which shall be paid by any such railroad company as a franchise or privilege tax shall be calculated. The basis upon which such calculation shall be made by the State Tax Commission and the extent to which every such railroad company is exercising its franchise in this State shall be found to be the value of the property, tangible and intangible, of each such railroad company in the State assessed for the year in which such report is made for *ad valorem* taxes. The franchise tax of each such railroad company for the privilege of exercising its franchise in this State shall be one-tenth of one per cent (0.1%) of the value so ascertained by the State Tax Commission, and such tax shall be due and payable on or before the fifteenth day of

Railroad companies to report annually.

Commission to certify values to Auditor.

Basis of calculation.

Rate of franchise tax.

When due.

October in each year. If any such company shall fail to make the report provided for, it shall be the duty of the State Tax Commission to make an approximation from the reports and records on file in that department of the amount of taxes due under this section, and certify same to the State Auditor and Treasurer for collection. No county, city or town shall be allowed to collect any taxes under this section.

Approximation if company delinquent.

No county, city, or town tax.

Commission to assess and fix proportion.

Sec. 82 (7). Upon the filing of the report provided for in subsections four, five and six, the commission, from the facts thus reported, and any other facts coming to its knowledge bearing upon the question, shall, on or before the first Monday in September, assess and fix the proportion of the subscribed or issued and outstanding capital stock of the company represented by its property or business in this State, and certify the same to the Auditor of the State on or before the first Monday in October.

Certificate to Auditor.

Auditor to charge for collection.

Sec. 82 (8). On or before October fifteenth the Auditor of State shall charge for collection, as herein provided, annually from such company, in addition to the initial fees otherwise provided for by law, for the privilege of exercising its franchise in this State, a fee of one-tenth of one per cent upon the proportion of the subscribed or issued and outstanding capital stock of the corporation represented by property owned and used for or business transacted in this State as found and certified by the State Tax Commission, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the Treasurer of the State on or before the first day of the following December. No county, city or town shall have the power to levy any franchise tax under this section.

Minimum charge.

When fee payable.

No county, city, or town tax.

Companies elsewhere taxed.

Sec. 82 (9). That nothing in the nine preceding subsections of this act shall apply to banks, insurance companies, fraternal, beneficent associations, building and loan associations, express, telephone

or telegraph companies, or other corporations, upon which a franchise tax may be levied in other sections of this act.

Correction of findings.

Sec. 82 (10). *General provisions.* Between the dates herein fixed for the determination of the amount of subscribed or issued and outstanding capital stock of a domestic corporation and the proportion of the authorized capital stock of a foreign corporation, represented by property owned and used or business transacted by it in this State, and the dates herein fixed for the certification to the Auditor of State of such amount or proportion, the commission may, on the application of any person or company interested, or on its own motion, review and correct its findings.

Treasurer to give receipts.

Sec. 82 (11). Upon the payment of the tax or fee provided for in this act to the Treasurer of State, the Treasurer of State shall make out and deliver to the public utility or corporation so paying a receipt for the payment by such public utility or corporation of the tax or fee herein provided for.

Lien for fees, taxes and penalties.

Sec. 82 (12). The fees, taxes, and penalties required to be paid by this act shall be the first and best lien on all property of the public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business or is in the hands of an assignee, trustee, or receiver for the benefit of the creditors and stockholders thereof.

Penalty for failure or neglect to report.

Sec. 82 (13). *Penalties.* If a public utility or corporation required to file a report by any provision of this act fails or neglects to make such report as required herein, it shall be subject to a penalty of ten dollars per day for each day's omission after the time limited in this act for making such report.

Sec. 82 (14). *Obsolete.*

Collection of taxes, fees, and penalties, by sheriff.

Sec. 82 (15). Such taxes and fees and penalties thereon may be certified by the State Audi-

tor to the sheriff of the county in which any such company has its home office, or of any county in which any such company may own property, for collection as provided in section four of this act, and if collection is not made in this way such taxes or fees and penalties thereon may be recovered by an action in the name of the State, which may be brought in the Superior Court of Wake County, or in any county in which such corporation has an office or place of business, or in which such public utility is doing business, or the line of any street, suburban, or interurban railroad company or railroad company is located, and such Superior Court shall have jurisdiction of such action regardless of the amount involved therein. The Attorney-General, on request of the State Treasurer, shall institute such action in the Superior Court of Wake County, or of any such counties as the State Treasurer may direct. In any such action it shall be sufficient to allege that the tax, fee, or penalty sought to be recovered stands charged on the delinquent duplicate of the Treasurer of State, and that the same has been unpaid for a period of thirty days after having been placed thereon.

Action for recovery.

Venue.

Jurisdiction.

Attorney-General to institute action.

Sufficient allegations.

Foreign corporations subject to liabilities and restrictions as home companies.

Sec. 82 (16). All foreign corporations, and the officers and agents thereof, doing business in this State, shall be subject to all the liabilities and restrictions that are or may be imposed upon corporations of like character, organized under the laws of this State, and shall have no other or greater powers. Every contract made by or on behalf of any such foreign corporation, affecting the liability thereof, or relating to its property within this State, before it shall have complied with the provisions of section eleven hundred and ninety-four of the Revisal of one thousand nine hundred and five, shall be wholly void on its behalf and on behalf of its assigns; but shall be enforceable against it or them. Nothing contained in this subsection

Contracts by or on behalf of foreign corporations.

Corporations.

shall be held or construed to apply to insurance corporations, fraternal, beneficiary associations, or building and loan associations, banking, railroad express, telephone, and telegraph companies.

Delinquency of corporations certified to Secretary of State.

Sec. 82 (17). If a corporation, wherever organized, required by the provisions of this act to file any report or return or to pay any tax or fee, either as a public utility or as a corporation, organized under the laws of this State, or as a foreign corporation for profit doing business in this State and owning and using a part or all of its capital or plant in this State, or as a sleeping-car, freight line, or equipment company, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this act for making such report or return or for paying such tax or fee, the Commission shall certify such fact to the Secretary of State. The Secretary of State, shall thereupon cancel the articles of incorporation of any such corporation which is organized under the laws of this State by appropriate entry upon the margin of the record thereof, or cancel the certificate of authority of any such foreign corporation to do business in this State, by proper entry. Thereupon all the powers, privileges, and franchises conferred upon such corporation by such articles of incorporation or by such certificate of authority shall cease and determine. The Secretary of State shall immediately notify such domestic or foreign corporation of the action taken by him.

Action by Secretary of State as to home companies.

As to foreign corporations.

Effect of action.

Secretary of State to notify corporation of action.

Penalty for exercising corporate powers after action by Secretary of State.

Sec. 82 (18). Any person or persons who shall exercise, or attempt to execrise any powers, privileges, or franchises under the articles of incorporation or certificate of authority, after the same are canceled, as provided in any section of this act, shall be fined not less than one hundred dollars nor more than one thousand dollars.

[CHAPTER 1, PUBLIC LAWS, EXTRA SESSION, 1920]

An Act to Revise and Limit Tax Rates for the Year 1920 in Compliance With Provisions of the Revaluation Act; to Provide Additional Revenue for the State From Franchise and License Taxes, and for Other Purposes.

The General Assembly of North Carolina do enact:

Section 1. That the assessment or valuation of property made under the provisions of chapter eighty-four of the Public Laws of one thousand nine hundred and nineteen is hereby approved by the General Assembly and adopted as the basis for the levy of tax rates by the State and by all subdivisions of the State for which taxes are levied for the year one thousand nine hundred and twenty, and the valuation of real property so fixed shall be adopted for the years one thousand nine hundred and twenty-one, one thousand nine hundred and twenty-two, and one thousand nine hundred and twenty-three, except as such valuations may be hereafter changed according to law.

Sec. 2. That section two of chapter ninety of the Public Laws of one thousand nine hundred and nineteen entitled "An Act to Raise Revenue" be repealed and the following substituted for section two of that act:

"Section 2. Poll and property tax.

"That no tax on property or polls shall be levied for the year one thousand nine hundred and twenty for the use of the State or for the State pension fund. There shall be levied and collected for the year one thousand nine hundred and twenty for the benefit of the State public school fund an *ad valorem* tax of thirteen cents on every one hundred dollars value of real and personal property in this State required to be listed by the revenue laws of the State and on each taxable poll or male between the ages of twenty-one

and fifty years, except the poor or infirm whom the county commissioners may declare and record fit subjects for exemption, there shall be levied and collected for the year one thousand nine hundred and twenty a tax of thirty-nine cents."

Sec. 3. That section three of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be repealed and designated as "obsolete."

Sec. 4. That the taxes levied in the foregoing section two shall be collected and paid into the State Treasury for the benefit of the public school fund in the manner provided by law for the collection and settlement of State taxes.

Sec. 5. That at any regular or called meeting of the boards of county commissioners of the several counties of the State, or governing authorities of the municipalities of the State, or of any other body in which there is vested authority to levy tax rates, held after the ratification of this act, rates of tax for the year one thousand nine hundred and twenty may be levied under existing authority of law upon the following basis and subject to the following limitations:

There shall first be ascertained the taxable value upon which the tax rates were levied for such county, municipality or special tax district for the year one thousand nine hundred and nineteen, and the total amount of revenue produced by the rate of tax so levied in the year one thousand nine hundred and nineteen. An addition of ten per cent may be made to such total amount of revenue for such county, municipality or special tax district for the year one thousand nine hundred and nineteen, and the total amount of revenue thus ascertained shall be the maximum limit for which rates may be levied in the year one thousand nine hundred and twenty; that is to say that such rate may be calculated with relation to the total amount of taxable property listed for each such county, municipality or special tax district as will yield in revenue for the year one thou-

sand nine hundred and twenty an amount not exceeding the revenue for the year one thousand nine hundred and nineteen plus ten per cent as ascertained in the number herein provided. Any rate of tax levied by any tax levying authority of any county, municipality or special tax district for the year one thousand nine hundred and twenty in excess of the rate herein authorized shall be held to be an illegal rate of tax in so far as such levy may be in excess of the amount of levy herein authorized: *Provided,* fractions of cents may be disregarded in making such tax levy.

Sec. 7. That for the purpose of providing additional revenue for the State in lieu of *ad valorem* tax on property heretofore levied by the State, the following taxes shall be levied and collected in the manner now provided by law for collection of similar taxes:

Sec. 7a. Franchise tax on corporations.

That the franchise tax provided in section eighty-two of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be amended by striking out section eighty-two (3) and of section eighty-two (8) the words "one twenty-fifth of one per cent" where they appear in said sections, and substituing in lieu thereof the words "one-tenth of one per cent," and by striking out of line twelve of section eighty-two (3) and line ten of section eighty-two (8) the word "five" and inserting in lieu thereof the word "ten."

Sec. 7b. That where a report required to be made by section eighty-two of chapter ninety of the Public Laws of one thousand nine hundred and nineteen to the State Tax Commission by any domestic corporation shows capital stock issued and outstanding by any such company to be less than one-half of the assessed value for taxation of all the property of such company in this State for the year one thousand nine hundred and twenty, or the report of any foreign corporation shows the proportion of the capital stock of such foreign corporation apportionable to this State under the rules laid down

in section eighty-two of the Revenue Act to be less than half of the assessed value for taxation of all the property of such company in this State for the year one thousand nine hundred and twenty, the measure of the extent to which the corporate franchise of any such corporation is being used and the amount of franchise tax to be paid by any such corporation shall be calculated with reference to the sum of one-half of the total assessed value of all the property of such corporation for the year one thousand nine hundred and twenty in this State.

Sec. 7d. Privilege or franchise tax on railroads. That section seventy-seven and seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be repealed and that section eighty-two (9) of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be amended by striking out of the third of the said subsection the word "railroad;" that section eighty-two of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be amended by inserting a new subsection to be designated as section eighty-two (6½) as follows:

"Section 82 (6½)—Railroads. Every railroad company doing business in this State shall on or before the first day of October, one thousand nine hundred and twenty, and on or before the thirtieth day of July annually thereafter, make and return to the State Tax Commission, in such form and upon such blanks as shall be furnished by the State Tax Commission, and giving such information as the State Tax Commission shall require, for the purpose of carrying out the provisions of this section, and upon which report the State Tax Commission shall ascertain and certify to the State Auditor the value upon which the amount of taxes which shall be paid by any such railroad company as a franchise or privilege tax shall be calculated. The basis upon which such calculation shall be made by the State Tax Commission and the extent to

which every such railroad company is exercising its franchise in this State shall be found to be the value of the property tangible and intangible, of each such railroad company in the State assessed for the year in which such report is made for *ad valorem* taxes. The franchise tax of each such railroad company for the privilege of exercising its franchise in this State shall be one-tenth of one (0.1%) per cent of the value so ascertained by the State Tax Commission, and such tax shall be due and payable on or before the fifteenth day of October in each year. If any such company shall fail to make the report provided for on or before the first day of October, one thousand nine hundred and twenty, it shall be the duty of the State Tax Commission to make an approximation from the reports and records on file in that department of the amount of taxes due under this section, and certify same to the State Auditor and Treasurer for collection. No county, city or town shall be allowed to collect any taxes under this section. The tax imposed by this section shall be in addition to the tax imposed by section seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen, prior to the ratification of this act, only in so far as the tax imposed by this section exceeds the tax imposed by section seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen, and if the tax imposed by section seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen for the year one thousand nine hundred and twenty have been paid by any railroad company such amount so paid shall be credited on the tax imposed by this section.

CHAP. 40, PUBLIC LAWS 1921.

AN ACT TO TRANSFER THE POWERS AND DUTIES OF THE STATE TAX COMMISSION TO THE STATE DEPARTMENT OF REVENUE.

The General Assembly of North Carolina do enact:

Date for transfer.

Section 1. From and after the first day of May, one thousand nine hundred and twenty-one, all the powers and duties imposed by any act of law, including Revenue and Machinery Acts, enacted by the present session of the General Assembly, upon the State Tax Commission, shall be transferred to and imposed upon a department to be known as the State Department of Revenue, created by this act, to be administered by the Commissioner of Revenue, to be appointed as provided in this act. All such powers and duties, except as otherwise provided herein, shall devolve upon the Commissioner of Revenue, and wherever in the revenue laws of the State the words "State Tax Commission" are used such words shall, after May first, one thousand nine hundred and twenty-one, be held to mean Commissioner of Revenue, except as otherwise provided in this act.

Transfer of powers and duties.

State Department of Revenue.

Commissioner of Revenue.

Office created.

Appointment.

Sec. 2. There is hereby created the office of Commissioner of Revenue, to be appointed by the Governor, by and with the advice and consent of the Senate, and if such appointment is made when the Senate is not in session, confirmation may be by the Senate at the next session. The term of office shall be for four years from and after the first day of May, one thousand nine hundred and twenty-one, and the succeeding commissioner of revenue shall be nominated and elected in the year one thousand nine hundred and twenty-four, in the manner provided for the nomination and election of other State officers, and quadrennially thereafter.

Term of office.

Election of successor.

Powers and duties as of State Tax Commission.

Sec. 3. The powers and duties now exercised by the State Tax Commission as a State Board of

Appellate authority.

Equalization, and the appellate authority exercised by the said State Tax Commission in determining appeals from valuations made by assessing officers in the several counties of the State, shall, from and after the first day of May, one thousand nine hundred and twenty-one, be held and exercised by a State Board of Equalization, composed of the Commissioner of Revenue, the chairman of the Corporation Commission, and the Attorney-General, who shall be *ex officio* members of and constitute the State Board of Equalization, to have and exercise the powers and duties now imposed by law upon the State Tax Commission as a State Board of Equalization, and as an appellate court, to hear and determine appeals from valuation of property by assessing officers in the several counties. The said board shall meet upon call of the Commissioner of Revenue as often as may be necessary to discharge the duties imposed by law upon the said board.

State Board of Equalization.

Ex officio members.

Meetings of board.